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Matthew S. DelNero

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Long Overdue?

An Exploration of the Status and Merit of a General Public Performance Right in Sound Recordings

- By Matthew S. DelNero*

"[T]hey are getting nothing for their work."[1] When U. S. Representative William I. Sirovich (R-NY) uttered these words in 1932, he decried the situation of musical performers who, under United States copyright law, were not afforded direct compensation for the public performance of sound recordings that they created. If Rep. Sirovich were alive today, he might express a similar reaction, as there has been little legislative progress in securing direct remuneration to performers and record companies in exchange for broadcasters' public performance of sound recordings.

To illustrate the absence of a general performance right in sound recordings, consider Frank Sinatra's rendition of *Come Fly With Me*, written by Jimmy Van Heusen and Sammy Cahn.[2] Under the Copyright Act, Van Heusen and Cahn are authors of the "musical work," and are entitled to a royalty each time the song is performed publicly.[3] ("Public performance" is defined broadly, including performances, whether live or recorded, in a bar or hotel lounge, on TV, over FM or AM radio, and so on.) Under U.S. copyright law, neither Sinatra, the performer of the sound recording, nor Capitol Records, his record label, is entitled to a royalty for the public broadcast of the *Come Fly With Me* recording, unless it is performed digitally over the Internet or on satellite radio.[4] Additionally, neither Sinatra nor Capitol receives a royalty for the recording's broadcast in one of the many countries that does grant full performance rights; such jurisdictions condition the right on reciprocal legal treatment by the performers' and copyright owners' home country.[5]

The canon of legal scholarship on this subject is quite broad, with numerous observers having addressed the lack of a general public performance right in sound recordings.[6] Most do so from a decidedly opinionated point of view, denouncing the right's absence as "illogical,"[7] a "failure,"[8] and an "economic injustice,"[9] while referring to adoption of a general performance right as "long overdue."[10] There is no known piece of domestic legal scholarship defending the status quo.

This battle has extended beyond the halls of academia. Since 1926, over twenty-five bills seeking to grant a full public performance right in sound recordings have been presented, without success, in the U.S. Congress.[11] Some observers, however, hail the 1995 adoption of a digital performance right in sound recordings as a significant advancement for sound recording copyright owners and artists.[12] Nevertheless, as recently as 2002, a legal scholar

made a spirited call for a "full" or "general" public performance right in sound recordings.[13]

Rather than approaching the issue from a position of advocacy, this paper explores the status and merit of a full sound recording performance royalty. It does so by focusing on the positions of the three leading stakeholders in the debate: record labels, recording artists, and radio broadcasters. First, in Part I, it describes the current state of the public performance right in the United States, concluding that regardless of legislative enactments in the mid- and late-1990s, there has been no significant net gain in performance rights for owners of sound recording copyrights. With that background in place, the paper explores in Part II the possibility that the right's nonexistence is due to a lack of merit in the right itself. It concludes that arguments advanced by supporters of the right are not as strong as their exuberance suggests and that actions taken by the recording industry during the digital performance debates of the 1990s give the broadcasting industry a reasonable basis for maintaining opposition to a full performance right. Thus, despite the seeming inequities of the current situation, broadcasters' economic self-interest is found not to be solely responsible for stifling the development of a general performance right in sound recordings. Nonetheless, under the current legal framework, the balance is likely tipped in radio broadcasters' favor; therefore, some realignment is called for. Hoping to spawn further discussion of an evenhanded solution to this nearly century-old debate, the article concludes in Part III by outlining the possible contours of a new performance right in sound recordings.

SINCE 1926, over twenty-five bills seeking to grant a full public performance right in sound recordings have been presented, without success in the U.S. Congress.

I. What is the State of the Public Performance Right in 2004?

Before exploring the merits of suggested changes to U.S. law regarding the public performance right in sound recordings, it is necessary to detail the current state of relevant music copyright law. This investigation is particularly important considering two related developments in the 1990s that, by some accounts, represent an advancement towards securing a general public performance right in sound recordings. The discussion begins by exploring the two basic interests in a recorded piece of music: the musical composition and the sound recording.

A. Musical Compositions

Within its definition of the subject matter of copyright, the U.S. Copyright Act includes "musical works," also known as "musical compositions."[14] The author of a musical composition is the songwriter, who often transfers his rights in a work to a music publisher in exchange for a percentage of royalties derived from the use of that work.[15] As owner of the copyright, the publisher may then authorize the reproduction, distribution, adaptation, and public performance of the musical work.[16] Although not directly a topic of this paper, it is important to understand the structure of the musical composition copyright, as it has long included a general right of public performance. The structure and operation of the musical composition copyright have served as reference points for advocates seeking to expand the same public performance right to copyright owners and performers of sound recordings.

1. Limited Rights of Reproduction and Distribution

Composers typically make their living by having their works recorded and brought to the public by one or more performers.[17] When an artist wishes to make a recording of a musical work which she did not compose and for which she does not hold the copyright, the composition owner's rights of reproduction and distribution are implicated.[18]

That is, by recording and selling a compact disc (or, in the words of the Copyright Act, a "phonogram"),[19] the recording artist is both reproducing the musical work in a fixed medium and distributing that work to the public.

At one point in time, most musical compositions were distributed and reproduced via the printing and sale of sheet music.[20] Such was the case until the 1880s, when the first popular means of "recording" a song emerged with the invention of the player piano and piano rolls.[21] Responding to widespread public demand, music publishers began granting licenses for the reproduction of their songs on piano rolls.[22] Manufacturers of piano rolls recognized the economic benefit of purchasing such licenses on an exclusive basis, and by the first decade of the next century, the Aeolian Piano Roll Company had nearly monopolized that market.[23] The free exercise of the reproduction right by one powerful industry, the music publishers, and the accumulation of those rights by another powerful actor, the Aeolian Company, threatened to upset the developing market for recorded music.[24]

THE right of public performance is "one of the most significant sources of income from a musical composition," with radio broadcasting providing the greatest single source of performance revenue to songwriters.

Emerging as the "most controversial issue"[25] of the 1909 Copyright Act, the Aeolian Company's growing market share and the collusion of music publishers forced Congress to seek a delicate balance that would honor music publishers' freedom of contract "without establishing a great music monopoly."[26] With this task in mind, Congress adopted what is known as a "mechanical" or "statutory" license for certain uses of musical compositions. Although the musical composition owner may choose to prohibit any mechanical reproduction of his work, once he has authorized the first recording for public distribution, the statute requires him to grant a license "upon request to any other person who proposes to make and distribute phonorecords of the work, at a royalty rate set by law."[27] In other words, once a composer allows one artist to record the song, he must allow any artist to record it. The composer then earns a mechanical or statutory royalty for every recording that is sold. Record companies and composers do not individually negotiate this licensing rate. Instead, the Copyright Royalty Tribunal, an independent agency created by Congress, is charged with the task of periodically revising the statutory mechanical rate.[28]

In recent years, annual mechanical royalty payments to composers and publishers have totaled nearly $700 million.[29] While the mechanism for distributing mechanical license royalties can be complex,[30] its importance here is to highlight Congress's ability to alleviate concerns of one industry's potentially dominating use of a particular exclusive right. Note that Congress chose a moderate solution, rejecting calls to refuse the right of mechanical reproduction altogether as well as those advocating a right without limits. It did so by limiting an otherwise exclusive right via a statutory license and was able to further ensure equitable remuneration and harmony through use of an independent royalty tribunal.

2. Exclusive Rights of Public Performance

The owner of the copyright in a musical work (*i.e.*, composer or publisher) has exclusive control over the right to "perform the copyrighted work publicly."[31] The definition of "public performance"[32] is broad, covering live performances, as well as broadcast by radio, television, Internet, satellite, and in any place "open to the public."[33] As a result, the right of public performance is "one of the most significant sources of income from a musical composition,"[34] with radio broadcasting providing the greatest single source of performance revenue to songwriters.[35]

The public performance right has its origins in nineteenth century Europe, where it was applied

to operettas and other dramatic works.[36] Before the right's adoption in the United States, several competing productions of a popular play typically ran concurrently.[37] These rogue productions, of course, eroded the profitability of any authorized production.[38] By failing to prevent the unauthorized public performances of musical works, the U.S. lagged behind its European counterparts for many years. As a result, the development of musical works in the U.S. suffered serious ramifications. As one author has explained:

> [W]hen Britain's Gilbert and Sullivan exported productions of their popular operettas to the United States, American producers purchased quantities of opening night seats for stenographers who transcribed the dialog. With a legally purchased copy of the musical score and a transcribed dialog, a producer could have his own production of a Gilbert and Sullivan show on stage within weeks – and without any payment to Gilbert and Sullivan.[39]

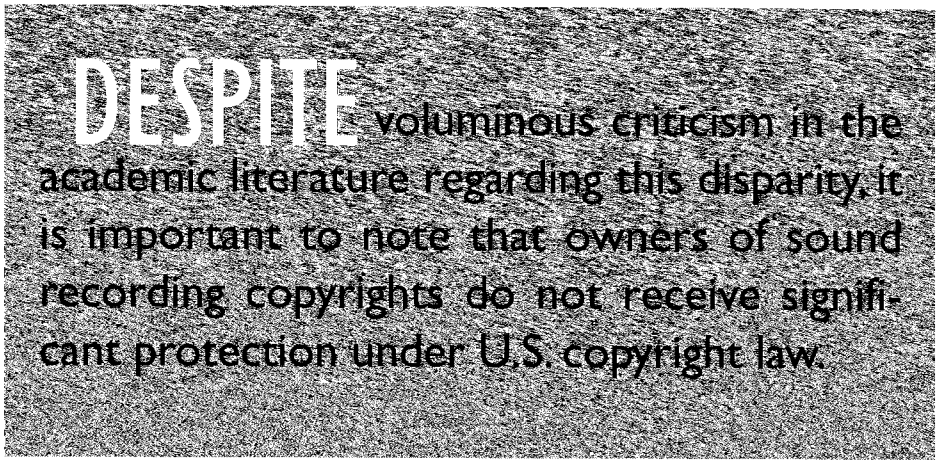
In 1897, the U.S. finally granted the right of public performance for literary works, including musical compositions.[40] It is interesting to note that owners of sheet music did not initially exercise the right, as they believed that the public performance of their works promoted sales of sheet music.[41]

The prevailing view among composers and publishers soon changed, and they desired to exercise the new performance right assiduously. They faced a problem, however, in that the right is, of course, not self-enforcing.[42] In 1914, recognizing the practical improbability of individual copyright owners engaging in direct negotiation with multiple users of their works,[43] "composers of every kind and condition of music and every big music publishing concern" met to form the American Society of Composers, Authors and Publishers (ASCAP).[44] ASCAP "intended to prevent the playing of all copyrighted music at any public function unless a royalty was paid."[45] In 1939, a similar performing rights organization (PRO), Broadcast Music Inc. (BMI), was formed.[46] A third and much smaller PRO, the Society of European Stage Authors and Composers (SESAC), initially focused on gospel music but has since expanded its repertoire.[47]

THERE is little doubt that the PRO's play an integral role in securing valuable public performance royalties for owners of copyrights in musical compositions.

By all accounts, the advent of the PRO concept has been a success, with current royalty collection estimates at over $1 billion per year.[48] Virtually "every domestic copyrighted composition" [49] may be found in the ASCAP and BMI repertories, with "billions"[50] of performances authorized each year. The two organizations, through their efficient policing of radio and television broadcasts, collect over 99 percent of domestic public performance royalties for musical works.[51] There is little doubt that the PROs play an integral role in securing valuable public performance royalties for owners of copyrights in musical compositions. By all accounts, the system has been "remarkably successful."[52]

In terms of the licensing system, music users such as radio stations will typically negotiate a blanket license with one of the PROs.[53] This license allows users "the right to perform any and all of the compositions owned by the members or affiliates as often as the licensees desire for a stated term."[54] For most large users, fees for the blanket license are based on a percentage of the organization's total revenues.[55] For example, during the years 1996-2000, ASCAP negotiated with broadcasters a rate of 1.615 percent for stations having annual gross revenue over $150,000.[56] Generally, this fee amounts to 3.5 percent of radio broadcaster revenue.[57] Fees are then distributed to the PRO's member-composers. Although the system for determining individual distributions can be complex,[58] it is helpful to note the guiding principle that "royalty distributions made to members for performances in each licensed medium should reflect the license fees paid by or attributable to users in that medium."[59]



Faced with the rising importance of the PRO in the 1940s, licensees expressed concern about their bargaining power vis-à-vis ASCAP (and later BMI). To address potential antitrust concerns, the U.S. Department of Justice entered into consent decrees with both of the leading PROs.[60] Although one could write a rather lengthy analysis of the consent decrees, for purposes of this discussion, the most pertinent factor is the designation of "rate courts" to adjudicate disputes over rates to be charged for use of works in the PRO repertories. Basically, if the user and PRO cannot agree on a "reasonable rate," the user may appeal for a determination by the rate court, and if the PRO is unable to establish that the fee it requested is reasonable, then the rate court "shall determine a reasonable fee based upon all the evidence."[61]

In considering the administration of public performance rights in musical compositions, it is helpful to draw a comparison to the mechanical license system limiting the reproduction and distribution rights in the same medium. As discussed earlier in Part I.A.1, Congress created that limitation on an otherwise exclusive right to control the potentially abusive practices of large stakeholders. With the public performance right, observers were wary of similar power on the part of the two major collective licensors. Faced with a structure that could have enabled anticompetitive practices by the PROs, the antitrust authorities crafted a public performance copyright system that balances the need of music users for access to a vast repertoire with the interest of composers and publishers in receiving adequate compensation. A common theme in the governmental responses to the reproduction, distribution, and public performance markets for musical compositions is a regulatory compromise that does not, on its face, favor one stakeholder over others. As will be discussed in Part II.B.2.b, the recording industry, in calling for a general public performance right in sound recordings, appears willing to ignore this important balancing lesson from the musical composition arena. And radio broadcasters have been similarly inflexible by continuing to advocate that there be *no* significant performance right in sound recordings.

B. Sound Recordings

The Copyright Act does not afford owners of sound recording copyrights the same level of protection that it grants to owners of musical works. Nevertheless, despite voluminous criticism in the academic literature regarding this disparity, it is important to note that owners of sound recording copyrights do receive significant protection under U.S. copyright law. Specifically, they are entitled to rights of distribution and reproduction, a limited adaptation right, and the right of public performance by digital means.[62]

1. Exclusive Right of Reproduction

Of pivotal importance to the American recording industry, the reproduction right held by sound recording copyright owners is relatively young when compared to the nearly 200 year-old reproduction right enjoyed by copyright owners of musical compositions.[63] Recording industry supporters fought a long and hard legislative battle to obtain the exclusive right of reproduction in sound recordings, culminating in a 1971 amendment to the Copyright Act.[64]

In extending reproduction protection to sound recording copyright owners, Congress cited the "widespread" growth of record piracy, estimated at the time to be costing the industry at a level equal to twenty-five percent the value of all legitimate sales.[65] Congress decried the availability of unauthorized cassettes "in gasoline stations, truck stops, highway rest areas, convenience stores, and other outlets that had never carried legitimately

recorded music."[66] Recognizing the inequity of the sound recording owners' position compared to that of the music publishers, the accompanying House report to the 1971 Amendment complained that "there is no Federal remedy currently available to combat the unauthorized reproduction of [a] recording."[67] Therefore, to protect record companies' "principal source of revenue" against significant erosion, Congress adopted the exclusive right of reproduction in sound recordings.[68]

Indeed, of the exclusive rights currently vested in sound recordings, the most valuable is the right to control the reproduction of a sound recording. The sale of sound recordings amassed an estimated $11.55 billion for the recording industry in 2002 alone.[69] Through a process known as "synchronization,"[70] additional revenues are generated whenever a sound recording is reproduced in conjunction with an audiovisual presentation, as is often the case in a movie or television show. In opposing a general performance right, radio broadcasters have pointed to this large volume of American sound recording sales and the income it produces.

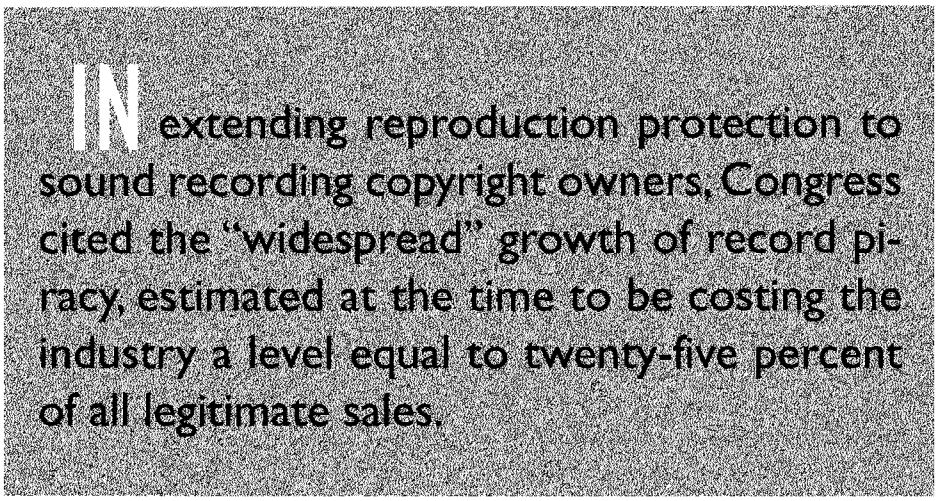
2. Longstanding Absence of a General Public Performance Right

Despite Congress's enthusiastic support for an uninhibited and exclusive *reproduction* right in sound recordings, the accompanying House Report to the reproduction Amendment was dismissive of calls for a *performance* right in those same sound recordings.[71] In the 1976 Copyright Act, Congress reaffirmed this decision, specifying in section 114(a) that "[t]he exclusive rights of the owner of copyright in a sound recording... do not include any right of performance under section 106(4)."[72] Thus, sound recordings were not to gain the general right of public performance enjoyed by owners of musical compositions since 1897.[73]

For over fifteen years after enactment of section 114(a), the domestic recording industry made no official effort to obtain a performance right in sound recordings.[74] Then, after launching a vigorous legislative effort in 1993, sound recording copyright owners seemed to have a reason to celebrate when Congress passed the Digital Performance Rights in Sound Recordings Act (DPRA) in 1995.[75] The Act granted an exclusive right of public performance for digital broadcasts transmitted by interactive services, defined as those enabling "a member of the public to receive, on request, a transmission of a particular sound recording."[76] Also, it created a right of remuneration for digital performances transmitted by noninteractive subscription services, but limited that right by granting broadcasters of such services the right to a new compulsory license.[77] Subject to the same compulsory license, the digital performance right was expanded to include noninteractive nonsubscription services when Congress passed the Digital Millennium Copyright Act (DMCA) in 1998.[78]

(a) Description of the Digital Performance Right

According to the legislative history, Congress enacted the DPRA to ensure that performing artists and record companies are protected from changes in the way consumers use sound recordings.[79] Describing digital recordings in compact discs (CDs) as the "dominant physical medium for the distribution of copyrighted sound recordings,"[80] Congress expressed concern that at least a "small number" of services were making transmissions of digital recordings available to subscribers via the Internet.[81] Although pleased that this phenomenon would "permit consumers to enjoy performances of a broader range of higher-quality recordings," Congress worried that the "streaming" of online music could "obviate the need for consumers to buy



anything physical in their quest to obtain digital quality music recordings."[82]

Of greatest concern to Congress was the so-called "celestial jukebox," an interactive service whereby Internet users could select "on-demand" music from a vast library of sound recordings.[83] According to the accompanying Senate report, interactive services "pose the greatest threat to traditional record sales."[84] Because artists and record companies depend upon such sales as their primary source of revenue, the DPRA grants sound recording copyright owners an exclusive right to control the use of sound recordings via interactive digital services.[85]

AFTER launching a vigorous legislative effort in 1999, sound recording copyright owners seemed to have a reason to celebrate when Congress passed the Digital Performance Rights in Sound Recordings Act (DPRA) in 1995.

Less troubling but still of some concern to Congress was the emergence of non-interactive webcasts.[86] These services operate much like traditional radio broadcasts, in the sense that the consumer does not control which sound recordings are aired. Since these webcasting services were in short supply at the time of passage of the DPRA and DMCA, it was difficult for Congress to gauge what effect they might have on the traditional revenue streams of recording companies and artists.[87] Congress was thus more attuned to the arguments of songwriters, who expressed concern that an exclusive license could "limit opportunities for the performance of musical works."[88] Accordingly, the DPRA and DMCA make noninteractive webcasts, whether of a subscription or nonsubscription nature, eligible for a compulsory webcasting license under which the owner of the sound recording copyright must license its work at a predetermined rate.[89]

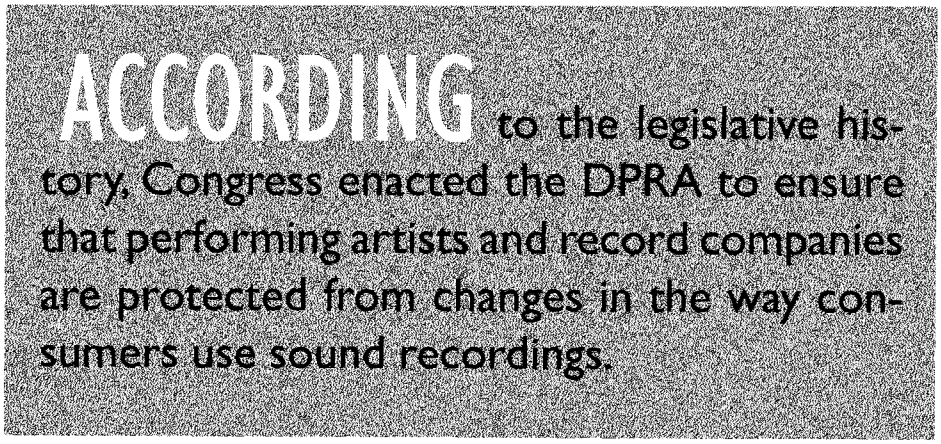
In the event that sound recording copyright owners and noninteractive webcasters are unable to agree upon a fee for use of the webcasting license, the Librarian of Congress is directed to convene a copyright arbitration royalty panel (CARP) to set a rate per a "willing buyer, willing seller" standard.[90] The CARP is also responsible for establishing a minimum fee for use of the webcasting license.[91] Both findings are subject to review by the Librarian of Congress, who may reject the CARP's determinations if found to be arbitrary or contrary to law.[92] As a result of the CARP process, webcasters willing to pay the set fee may make digital, noninteractive transmissions without having to negotiate license fees with sound recording copyright owners.[93]

In February 2002, the first CARP announced its findings for the webcasting license. By all accounts, the proceedings were acrimonious.[94] While much could be written about the CARP, for purposes of this discussion it is most important to note that the panel was decidedly in favor of rate proposals put forth by the Recording Industry Association of America (RIAA), rather than those of the webcasters.[95] A key example of the RIAA's success is the panel's decision as to the metric for calculating royalty rates. The webcasters requested the option of a percentage-of-revenue license equal to three percent of gross revenues. This figure, they explained, was "taken straight from the ASCAP/BMI/SESAC broadcast radio licenses [for the public performance of musical compositions]."[96] The RIAA, however, objected, requesting that the CARP set a per-performance fee of .4 cents per individual listener reached.[97]

The CARP found that under a true "willing buyer/willing seller" approach, the RIAA's per performance measure would be more accurate.[98] According to the CARP, such a measure reflects that which is actually being used, because "the more intensively an individual service uses the rights being licensed, the more that service shall pay, and in direct proportion to the usage."[99] The CARP did not directly respond to the historic example set by

ASCAP and BMI, despite the fact that both PROs employ a percentage-of-revenue model in setting fees for the use of a blanket license, and both are subject to a "reasonableness" determination in a rate court per their respective antitrust decrees.[100]

In its review of the CARP's determination, the Librarian of Congress made certain changes to the proposed rates, yet nevertheless maintained the overall per-performance structure.[101] Rates for use of the statutory webcasting license are calculated at .07 cents per performance, per listener.[102] Also, the statutorily mandated minimum fee is set at $500.[103] The Librarian's decision set off a firestorm of opposition, with the webcasting advocacy group Digital Media Association (DiMA) proclaiming that the RIAA was not "seriously interested in royalty rates that will enable thousands of small webcasters to survive, or that will enable music lovers to continue enjoying... [a] diverse Internet radio experience."[04]



Reacting to the massive political fallout, the RIAA agreed in October 2002 to accept a percentage-of-revenue royalty rate of eight percent of gross revenues, or five percent of expenses (whichever is greater) for those webcasters with gross revenues of less than $1,000,000 during the period from October 28, 1998, to December 31, 2002.[105] The recording industry made similar, yet slightly more complicated, provisions for royalty payments by small webcasters during the 2003-04 term.[106] The agreement was approved by Congress and codified via the Small Webcaster Settlement Act of 2002.[107] SoundExchange, the nonprofit organization established by the recording industry to collect its public performance royalties, avoided another CARP for the 2003-04 term by reaching a separate agreement with larger webcasters in April 2003.[108]

(b) The Net (In)significance of the Digital Performance Right

Although the new digital performance right is important in some respects, its significance has surely been overstated. While attempting to secure passage of the digital performance right, some members of the recording industry proclaimed the DPRA and DMCA as momentous achievements in the field of performance rights law.[109] As one journalist explained, the recording industry's attitude could be paraphrased as, "this medium poses a dramatic risk to everything we do. Those old laws were always ridiculous... and here is a chance to make things right."[110]

In fact, though, the DPRA and DMCA create "critical limitations" on the public performance right.[111] Only performances in digital format are covered, thus excluding the average terrestrial, or "over-the-air" AM/FM broadcasts.[112] Terrestrial broadcasts remain exempt from the public performance right even if made in digital form, so long as they are free to consumers.[113] One cannot reasonably see the DPRA and DMCA, with all their limitations, as significant expansions of the public performance right to the realm of sound recordings. Recall that the Copyright Act of 1976 created five particular rights in a copyrightable work, one of which was the public performance right. It codified these rights in five paragraphs of section 106 of Title 17 of the U.S. Code. As discussed earlier in Part I.B.2, sound recordings were specifically exempted from the public performance right of section 106(4). The DPRA and DMCA did not remove that exemption; rather, the digital performance right exists at an entirely new paragraph, section 106(6). These separate classifications are not insignificant. By referring to a public performance right for a "digital audio transmission," a term lacking in any precedent in copyright law, Congress signaled that a "qualitatively new right is being created."[114]

One prominent commentator, David Nimmer, has explained that but for the advent of the digital transmission of sound recordings, Congress would not have seen fit to confer *any* new public performance right.[115] The legislative history supports his assertion. For example, the Senate report to the DPRA explicitly rejects a call by the then-Register of Copyrights, Marybeth Peters, that "the time has come to bring protection for performers and producers of sound recordings into line with the protection afforded to the creators of other works."[116]

In light of the structure and history of the DPRA and DMCA, sound recording copyright owners and artists are intended to receive no greater royalty compensation than that to which they were entitled under the traditional analog system, which depended entirely upon revenues from the exclusive rights to reproduce and distribute sound recordings.[117] This principle of "substitution,"[118] which seeks to compensate sound recording owners and artists solely for phonogram sales dollars lost to new distribution technologies, explains why the DMCA and DPRA may represent a net gain of zero for the sound recording industry.[119] Congress meant only to avoid substitution effects; it "did not contemplate providing copyright owners a windfall."[120]

There is a final piece of evidence indicative of the digital performance right's aggregate insignificance. As discussed further in Part II.A.1, since the introduction of the Rome Convention in 1961, supporters of a new performance right have pointed to the presence of the general performance right in other countries as justification for domestic adoption thereof. Specifically, supporters cite the fact that these countries grant the right to foreign works only on the condition of reciprocal treatment by the copyright owner's home country. As one journalist succinctly put it, "U.S. artists do not get royalties when their music is performed on foreign radio stations, just as non-U.S. artists don't get money for when their songs hit American radio."[121] Yet neither the DPRA nor the DMCA will make much of a difference in this respect. As Professor Nimmer has explained, had Congress wished to maximize foreign revenue to its recording industry constituents, "it would have followed the Copyright Office's recommendation and simply extended the blanket performance right to sound recordings."[122] Although some legislators and observers may have thought that the laws of 1995 and 1998 would alleviate losses suffered by domestic sound recording owners in foreign markets,[123] the new digital right was far too narrow to trigger reciprocal treatment abroad.[124]

CONSIDERING the distinct nature of the digital performance right in sound recordings, it appears that no significant progress has been made in attaining a general public performance right in sound recordings.

Considering the distinct nature of the digital performance right in sound recordings, it appears that no significant progress has been made in attaining a general public performance right in sound recordings. One possibility for this phenomenon is that the right is not warranted, a possibility explored, and only partially rejected, in the following section.

II. Is there Merit to a General Public Peformance Right in Sound Recordings?

As mentioned in the Introduction, there is a wealth of scholarly, journalistic, and governmental literature calling for the adoption of a general public performance right in sound recordings. Among the justifications offered are a desire for international harmonization of the copyright laws, loss of potential royalties abroad, creation of incentives for the production of new and unique recordings, and basic notions of equity between composers and recording artists. Opponents of the right, however, have advanced the notion that artists and sound recording owners are already justly compensated by the promotional effect that radio airplay has on record

sales. They also argue that a general performance right would bankrupt the broadcasting industry and that the social costs attendant to the new performance right may skew the optimal balance between the creation and use of intellectual property. Each line of argument, both pro and con, speaks to a fundamental question: Is there merit to a general public performance right in sound recordings? To answer this crucial question, it is necessary to consider the various arguments, pro and con, in further detail.

OPPONENTS of the right, however, have advanced the notion that artists and sound recording owners are already justly compensated by the promotional effect that radio airplay has on record sales.

A. In Favor of a General Right of Public Performance in Sound Recordings

1. Concerns of the International Market Support a Public Performance Right

In recent years, numerous Copyright Act revisions have been made in the name of the international harmonization of copyright laws. In 1976, for example, one of the major justifications for Congress in adopting a life-of-the-author plus fifty year copyright term was to "align... United States copyright terms with the then-dominant international standard."[125] Adding an additional twenty years to that term, the subsequent Congressional decision to enact the Copyright Term Extension Act (CTEA) sought to "harmonize... the baseline United States copyright term with the term adopted by the European Union in 1993."[126]

Appealing to that goal of harmonization, supporters of a general public performance right in sound recordings claim that the right's adoption would bring U.S. law in-line with that of our neighbors abroad. The title of a recent scholarly article on the subject sums up the argument well: "Dancing to the Beat of a Different Drummer: Global Harmonization – and the Need for Congress to Get in Step with a Full Public Performance Right for Sound Recordings."[127] Similarly, a *Billboard* editorial carried the moniker, "U.S. Should Get in Step with Other Nations; The Case for a Performance Royalty."[128] Many other commentators have used international harmonization as justification for U.S. adoption of a general performance right in sound recordings.[129]

As specific proof that adoption of the right would harmonize U.S. law with that of the global marketplace, supporters point to the Rome Convention, formally known as the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations.[130] The only international treaty governing performers' rights in sound recordings, the Rome Convention has been in force since 1961.[131] The Convention requires signatories to grant equitable remuneration to either performers or producers of sound recordings, or both. Specifically, Article 12 states that:

> If a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonograms, or to both. Domestic law may, in the absence of agreement between these parties, lay down the conditions as to the sharing of this remuneration. [132]

Although an active participant in its drafting, the U.S. neither signed nor ratified the Rome Convention.[133] In the last two decades, however, there has been a rapid increase in the number of states seeking membership in the Convention.[134] As

APPEALING to the goal of harmonization, supporters of a general public performance right in sound recordings claim that the right's adoption would bring U.S. law in-line with that of our neighbors abroad.

of October 2003, 76 countries were signatories to the Rome Convention.[135]

Rights under the Rome Convention are commonly known as "neighboring rights," granted to foreign countries only on a reciprocal, as opposed to national, basis.[136] Thus, only those sound recording owners and performers who are nationals of a Rome Convention member country receive performance rights in other member countries.[137] Given this structure, advocates point to the fact that were the U.S. to become a party to the Rome Convention, it would be entitled to reciprocal treatment and would accordingly receive performance royalties when sound recordings owned by U.S. nationals are performed within the jurisdiction of member states.[138] Those advocating for a general performance right point out that without it, "American recording artists and record labels are not entitled to receive the millions of dollars in foreign royalties collected that would otherwise be payable."[139] In other words, as another commentator explained, "what moves this issue forward is [a] significant amount of money."[140]

On the surface, it appears that the U.S. has a compelling profit motive to desire membership in the Rome Convention's reciprocal rights regime. Estimates as to the amount of money at stake vary, but they all predict vastly increased riches for performers and record labels. For example, a 1990 estimate suggested that American performers were then losing $27 million per year due to the lack of U.S. membership in the Convention.[141] Even if an exact estimate of potential performance royalties lost is not available, it is easy to infer a large number from the fact that over sixty percent of foreign record sales are of albums made by Americans.[142]

In view of the steadily increasing number of signatories, it is tempting to conclude that U.S. accession to the Rome Convention would promote the goal of international harmonization and would reap a substantial financial windfall for U.S. performers and producers of sound recordings. Such would be the case were it not for a little-referenced option under Article 16(1)(a)(i) of the Convention, which provides:

> Any State, upon becoming party to this Convention, shall be bound by all the obligations and shall enjoy all the benefits thereof. However, a State may *at any time*, in a notification deposited with the Secretary-General of the United Nations, declare that as regards Article 12, it will not apply the provisions of that Article.[143]

Twelve states thus far have exercised their right to opt-out of Article 12 performance rights obligations.[144] One cannot ignore the opt-out factor in considering the effect of future U.S. membership in the Rome Convention. That is, many countries, especially those with comparatively small domestic recording industries, would likely not have entered the Rome Convention's reciprocal rights regime if doing so would have triggered a large outflow of new royalty payments to U.S. sound recording copyright owners.

To illustrate the limitation of a pro-performance right argument relying on reciprocal compensation, it is helpful to consider a few selected country examples. First are two states, the United Kingdom and France, which are considered to be firm participants in Article 12, unlikely to waiver from their participation decision. Both are major recording industry leaders.[145] Since a landmark court decision in 1934, the U.K. has recognized a right of public performance in sound recordings.[146] The U.K. recording industry is strong, with sales of £1.155 billion (approximately $2.08 billion) in the four quarters preceding September 30, 2003.[147] Although France did not officially enact a legislative public performance right in sound recordings until 1985,[148] it too has a long history of honoring performance rights in sound recordings.[149] Also like the U.K.,

France has a strong domestic recording industry. Its is the fifth largest in the world, with sales of over 7.379 billion francs (approximately $1.05 billion) in 2000.[150]

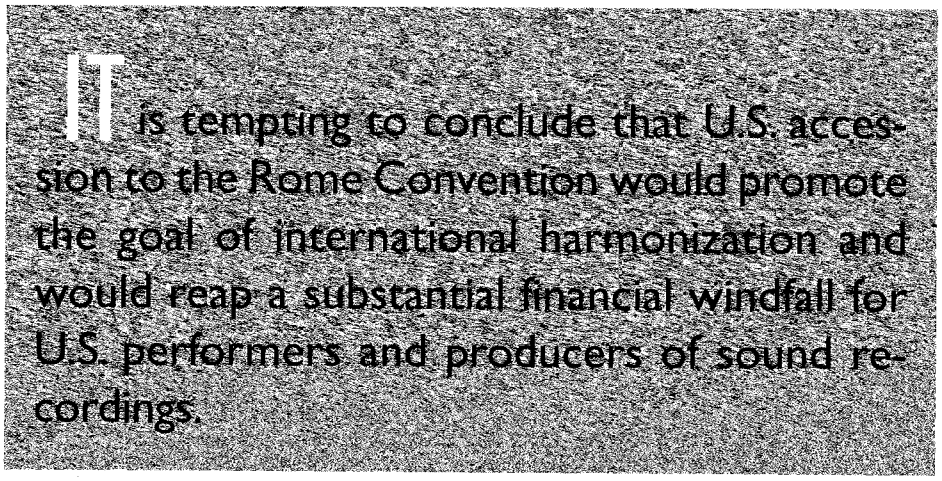
Yet the U.K. and France are not typical Rome Convention signatories. Most participants, in fact, have comparatively small domestic recording industries, and would thus incur a royalty imbalance with the U.S. following American adoption of the Convention. For example, one of the Rome Convention's most recent signatories[151] is America's largest trading partner, Canada.[152] Although Canada had previously adopted the right, it changed course and removed the right in 1971, partly in response to broadcaster opposition.[153] Re-introduction of the right in the 1990s was "highly controversial," and occurred only after "extensive debate."[154]

Impact of the new Canadian performance right is significantly limited by the fact that each broadcaster need only pay annual royalties of $100 CAD ($76.80 USD) for the first $1.25 million CAD ($959,951 USD) in revenue.[155] The legislative history of the 1997 Act indicates that this safe harbor was designed to mollify the fears of broadcasters. As the Canadian Standing Senate Committee on Transport and Communications has explained, "[t]his preferential rate... cover[s] about 65 per cent of Canadian radio stations."[156] The Canadian situation stands in stark contrast to that of the digital performance right in the U.S., where a *minimum* fee of $500 was imposed for use of the statutory webcasting license regardless of a webcaster's revenue stream.[157] Consequently, the Canadian example does not necessarily represent a "full" public performance right in sound recordings.

In addition to the $100 CAD ceiling on fees to be paid by the majority of broadcasters, American observers should also be cognizant of the role that U.S. non-participation in the Rome Convention played in the Canadian decision to re-enact a performance right in sound recordings. First, note that one of the reasons for abolition of the right in 1971 was concern that America would join the Convention, provoking in Canadian authorities a "well-founded fear that most royalties would be paid out to the United States, which exports large numbers of recordings to Canada."[158] Both then and now, U.S. copyright holders are estimated to own more than fifty percent of all recordings publicly performed in Canada.[159] If the U.S. were to adopt neighboring rights under the Rome Convention, a large southern outflow of royalty payments would be required of Canadian broadcasters. In fact, fearful of reciprocal obligations for digital performances under the DPRA and DMCA, the Canadian Standing Senate Committee on Transport and Communications advised:

> [T]he U.S. will enforce "neighbouring rights" related to digital radio offered to consumers on a subscription basis. Your Committee therefore recommends that the Government immediately undertake an in-depth study of the new digital technologies, in particular the Internet, and the impact their widespread commercial deployment might have on the payments Canadian broadcasters may have to make to both Canadian and foreign rights holders.[160]

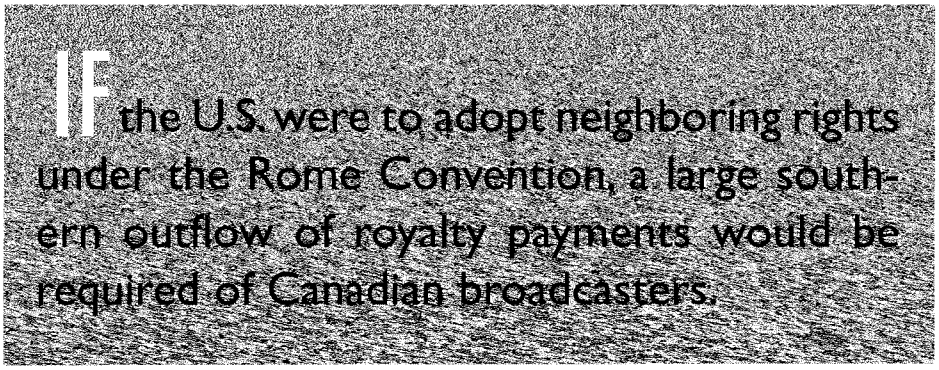
It seems likely that U.S. adoption of a general performance right in sound recordings would trigger a retreat of recent Canadian copyright advances. Specifically, the Canadian Parliament could be expected to modify its instrument of ratification to the Rome Convention by including a declaration under Article 12(1)(a)(i), opting-out of the reciprocal public performance obligation for sound recordings.[161] The plausibility of this scenario weakens the argument that U.S. implementation of the Rome Convention



would serve the international harmonization goal of American copyright law.

Like a Delphic sword, the reciprocity argument cuts both ways. In explaining the role of reciprocity under the Rome Convention (and citing that role as incentive for U.S. adoption of a general performance right in sound recordings), one commentator has written that "[r]eciprocity principles are a form of economic protectionism employed in countries where imports of copyrighted works far exceed exports."[162] That observation is correct, but a bit blunt. Reciprocity serves no protectionist function for an economically self-interested country if performance royalty eligible imports far outpace exports, as would be the case for many countries if the U.S. were to join the Rome Convention's reciprocal rights regime. Hence, perhaps the preceding statement could be rephrased to say that under the Rome Convention, "reciprocity principles are a form of economic protectionism employed to avoid payment of performance royalties to the U.S., a particularly large exporter of sound recordings."

As advocates for a general performance right in sound recordings are eager to point out, "United States performers would reap the largest share of the foreign performance rights royalties that have been set aside so far."[163] With such large prospective payments to U.S. interests, however, it is hard to ignore the possibility of defections from Article 12 by current member states.[164] There are far more Rome signatories in the Canadian position, with a comparatively weak domestic recording industry, than there are countries like France and the U.K., which have relatively robust domestic industries.[165] In some countries, it has been estimated that as many as ninety percent of broadcasted sound recordings are American-made.[166] Accordingly, the proposition that U.S. adoption of the Rome Convention would advance the goal of international copyright harmonization and generate a substantial windfall for U.S. performers and producers must be followed by a disclaimer regarding the possibly disruptive effects of U.S. participation in the treaty's reciprocity scheme.



2. EquityDemands that Recording Artists and Producers Receive a Performance Right

Above and beyond economic notions, proponents of a sound recording performance right typically cite basic principles of equity as justification for their position. Under this argument, there should be a general performance right in sound recordings because performers and record companies *deserve* it. This stance dates back to the early days of the performance rights debate. Congressman Sirovich, for example, expressed concern in 1932 about the lack of "protection to the author and manufacturer who puts his talents or his money into the [sound recording] without getting any compensation from the others who are using it for commercial gain."[167]

The first branch of the equity-based argument is of a comparative nature. It considers the contribution to the finished product by, on the one hand, performers and producers, and, on the other, composers. Commentators of this view decry the granting of a public performance right to "the person who puts the words on paper and the person who sets those words to music," yet not to "the performer who brings that sheet music to life nor to the record company that invests time, money, and artistry to make that recording possible."[168] That is, "[b]oth the performers and record companies... make a creative contribution comparable to that of the composer."[169]

The comparative equity argument has some force. Looking to popular culture, it is obvious that consumers are often more interested in the performer than the composer. Most teenagers, for example, probably do not know the names Bruce Robison and Farrah Braniff. They are certainly aware, however, of the Dixie Chicks,[170] a pop-country

ensemble which last year took those composers' work to the top of the Billboard charts.[171] Returning to an earlier example, Old Blue Eyes (Frank Sinatra) remains a household name, unlike his trusty composer, Sammy Cahn.[172] As one advocate for a new performance right has explained, in listening to a song, "we are as much listening to it because of that performer's skill and style as because of the skill and style of the musical composer, lyricist, or music publisher (who all receive performance royalties)."[173]

While it is no doubt inaccurate to view the contribution of artists and producers as *more* important than that of composers, there is certainly a "creative interdependence" among the parties.[174] In other words, "[a]bsent a recording... the musical composition is silent."[175] Given the importance of sound recordings to music as we know it, there is a strong equitable argument for granting a performance right in sound recordings.

RECIPROCITY serves no protectionist function for an economically self-interested country if performance royalty eligible imports far outspace exports, as would be the case for many countries if the U.S. were to join the Rome Convention's reciprocal rights regime.

In addition to the role of the performer, of course, there is the creative contribution of the producer. It is the producer who acts as conductor of the operation, putting together all the necessary components, such as performers, composers, editors, and arrangers.[176] Furthermore, much of the financial risk in creating a sound recording is borne by the record producer.[177] The producer is akin to a music publisher, who typically receives half of all public performance royalties for a musical composition.[178]

The second prong to the fairness argument is based on the idea of changed circumstances. Recall the success of the recording industry in achieving enactment of the digital performance right. That accomplishment was almost entirely based on the industry's ability to argue the effects of substitution. As explained in Part I.B.2, supporters cited a desire not for a net gain in revenue, but rather for the right to simply "keep up" in light of a paradigm shift in the use of music. This argument was of both an economic and an equitable nature; Congress decided it was not fair to allow performers and record companies to suffer economically because of structural changes in the industry. Though not achieving the same success, a similar economic/equitable argument emerged as early as the 1930s, when the recording industry expressed growing concern that "a performer's job [was] being replaced by the use of his own recorded performance."[179] In a landmark 1978 report on the performance royalty question, the Register of Copyrights wrote that "the transition in the broadcasting industry from the use of 'live' performances to recorded performances caused severe dislocation in employment among performers."[180] Changed circumstances during the twentieth century thus supported an equitable argument that performers should be granted a performance right in sound recordings.[181]

Despite the many historical changes in the commercial use of sound recordings, Congress has only ever addressed one such shift, that which accompanied the Internet boom of the 1990s. Yet unlike the limited digital performance royalty, a general performance right in sound recordings could serve as a cushion for artists and labels against the extreme effects of unforeseen shifts in the use of music. A general right would avoid the piecemeal tactic employed in the DPRA and DMCA, which bluntly attacked an emerging industry without confronting the ongoing problem of a "free ride" for traditional users of music, such as terrestrial radio broadcasters.

The flip side of the equity argument holds that although performers and producers are not directly compensated, they nevertheless receive sufficient remuneration from the promotional impact

of radio airplay, which in turn generates additional record sales. The intricacies of this argument, and specific responses by the recording industry, are considered in Part II.B.1.

3. A Performance Right in Sound Recordings Would Serve the Copyright Act's Incentive Purpose

The Constitutional purpose of copyright law is to "promote the Progress of Science and useful Arts."[182] Arising from the Copyright Clause is the incentive rationale for copyright, whereby the grant of a copyright monopoly provides authors the incentive to create new works and ultimately benefits the "progress of the arts and sciences" for the public at large.[183] Under this principle, copyright laws should be designed so as to encourage the production of new works.

Congress has explicitly accepted the incentive rationale for granting expanded copyright protection. For example, in its controversial 1998 decision to extend the copyright term by twenty years, Congress explained, "[e]xtending copyright protection will be an incentive for U.S. authors to continue using their creativity to produce works, and provide copyright owners generally with the incentive to restore older works and further disseminate them to the public."[184] While many scholars have doubted the incentive effect of the twenty year term extension,[185] the important point is that legislative leaders have relied on the rationale in making significant amendments to the Copyright Act.

A general performance right in sound recordings could serve as a cushion for artists and labels against the extreme effects of unforeseen shifts in the use of music.

Some commentators have cited a public performance right in sound recordings as serving the incentive rationale of copyright law.[186] It is, of course, difficult to measure the effect of the performance right in stimulating the production of new works. One cannot know what would or would not be created if artists had more or less money.[187] Also, there is surely a diminishing marginal return financially for those artists already at the top of their field.[188] An extra few million dollars would do little for an artist such as pop-megastar Madonna, who already has all the economic incentive she might ever need to produce new works. Yet for the many artists who operate at the margin, a performance royalty could provide the necessary income to prevent exit from the recording business.[189] It is only logical to assume that for artists living paycheck-to-paycheck, even a modest performance royalty could spur the ability and desire to produce new works.[190] At the very least, the performing rights incentive argument is as credible as the many other incentive-based rationales found throughout U.S. copyright law.

Under a performance royalty regime, it is also possible that record companies will have more incentive to produce albums for artists who, without the promise of a performance royalty, may not generate enough sales to justify the economic risk of production. Currently, most CDs sell very few copies; the bulk of CD profits are generated from the sale of a few very popular discs.[191] The major record companies have concluded that a focus on those few performers who can sell recordings in large quantities is the most profitable strategy.[192] This may well be a rational response, given that sound recording sales provide the primary revenue stream for the industry.[193] The introduction of a general performance royalty, however, could cause a shift in record companies' business models, resulting in a larger and more heterogeneous body of widely available music.

To the extent that American copyright law is willing to accept incentive-based arguments (and the experience of the CTEA shows that it is), one must consider the fact that at least some new works will be produced as a direct result of the performance royalty. While this indeterminate promise of new works may not, on its own, be sufficient to justify enactment of a new performance royalty, it could help tilt the scale in that direction. The contrary

argument, that copyright law must balance the social benefits of the incentive stimulus against the resulting diminution in public access to copyrighted material, is discussed in Part II.B.3.

B. In Opposition to a General Performance Right in Sound Recordings

1. Sound Recordings Owners and Artists Already Receive Adequate Compensation from the Promotional Benefit of Radio Compensation

The promotional effect of radio broadcasting on sales of sound recordings has provided the strongest justification for not enacting a general performance right. Radio broadcasters do not dispute that artists and producers deserve compensation for the public performance of their works, but insist that such compensation already occurs indirectly through the promotional benefit of "free airplay." The broadcasters' theory of indirect compensation from promotional effects turns the recording industry's equity-based argument on its head.[194] This position was perhaps best summed-up by James Popham, an attorney for the National Association of Broadcasters (NAB), during congressional hearings in 1975:

> It is... the efforts of radio broadcasters that are primarily responsible for huge record sales and huge audiences at recording artists' concerts. We insure broad exposure for creative work via airplay of records, and thereby, promote and stimulate the sale of original artistry. We, too, insure appropriate [rewards] for creative endeavors and encourage additional creative efforts by record companies and recording artists.[195]

The current picture of the radio broadcasting industry, rife with a practice known as "payola," gives credence to broadcasters' promotional argument.[196] As such, a complete analysis of the performance right debate cannot ignore the widespread presence of payola in radio.

The phenomenon of "payola," or record companies' directly paying rock n' roll DJs in exchange for playing certain songs, peaked during the 1950s and 60s and quickly scandalized the American public.[197] Such direct pay-for-play was "a routine part" of the music industry[198] but was ostensibly ended when outlawed by Congressional action in 1960.[199] Not surprisingly, the industry found a loophole, with record labels using a middleman to achieve the same result. Under modern-day payola, an independent promoter pays a set fee, generally between $100,000 and $400,000,[200] to create an exclusive arrangement with a radio station under which it will represent the station in relations with record companies.[201] Record companies, in turn, pay the promoter, who is responsible for "suggesting" songs to be played by its client radio stations.[202] Labels typically pay between $800 and $5,000, depending on market size, to a promoter for each song added to a station's playlist.[203] Nationwide, labels will often spend from $200,000 to $300,000 for one song's promotion, and at times may spend up to $1,000,000.[204]

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For purposes of the performance royalty debate, the function and practice of payola reveals the importance and value of radio airplay to the recording industry's bottom line. In complaining

about the high cost of payola, artists cite the *need for radio play* as a means to achieving record sales. For those without financial means, payola blocks that crucial avenue to success. Rapper Chuck D, for example, slams the practice in a song called *Crayola*, singing that "[p]ay for play is the only way to get them platinum plaques."[205] One struggling artist told an ABC News reporter investigating payola that "[r]adio's the standard for music. That's where most people go to hear new music."[206]

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Legal commentators concur as to the rationale for payola's existence. As a recent article explained, "[a]lthough the practice of payment for broadcast may seem inconceivable to listeners, the reality of the high stakes music industry is that songs must receive airplay if both the recording artist and the record label are to survive."[207] Professor Ronald Coase, defending the practice in 1979, described payola as a "price mechanism for efficiently allocating this scarce but otherwise unpriced on-the-air advertising of popular music."[208]

The fact that record companies, faced with a recent downturn in sales, are seeking a reduction in payola does not at all change the implication of the practice on the performance royalty debate. They complain only of paying "ever higher promotional sums in an attempt to influence radio play, with diminished results."[209] Note that no label seeks an actual diminishment of the *ability* to influence radio airplay decisions. Rather, they hope for a more economically efficient means to do so. Comments of artists and legal observers all point to the same reality: unless a new sound recording receives significant airplay, it cannot hope to achieve equally significant sales in record stores. The widespread presence of payola strongly suggests that record companies and artists receive a net promotional benefit from the public broadcasting of new sound recordings.

The recording industry has failed to respond directly to the strong evidence, found in the widespread practice of payola, that the public broadcasting of sound recordings provides significant promotional benefits. Nevertheless, the strength of broadcasters' payola contentions are diluted by certain countervailing factors. First is the issue, as discussed in Part II.A.2, of equity. Also, relatively new recordings are the only ones that receive a promotional benefit. The following discussion explores both factors and considers their effect on the weight of broadcasters' promotional argument.

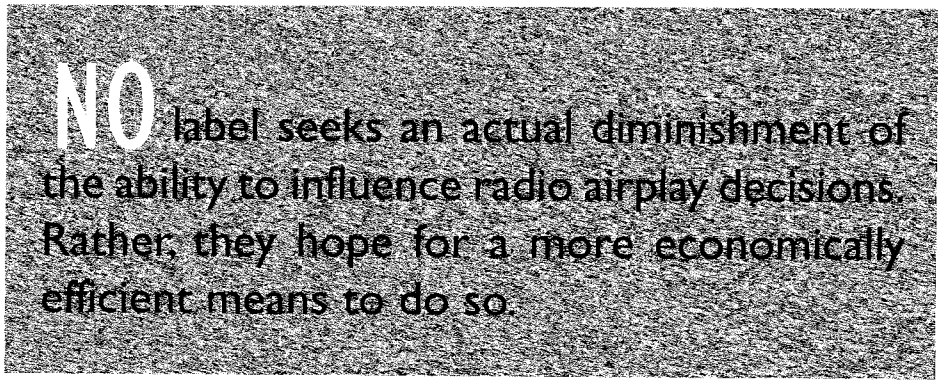
Supporters of a blanket performance right in sound recordings often counter the promotional argument by resorting to notions of equity. While the argument is similar to that described above in Part II.A.2, here it is more specific. Whether or not record companies profit from radio airplay, it is certainly the case that radio stations benefit as well. For instance, in the Los Angeles market, year-end radio advertising revenue for one recent year totaled $846 million.[210] Advocates for a performance right thus ask: where would radio be without sound recordings?

It is demonstrably evident, as a matter of logic, that terrestrial radio is benefiting from the use of sound recordings without having to tender payment for that right. The primary economic motivation for traditional radio broadcasters in playing music is income, not the beneficent promotion of records. Note that it is advertising, not payola, that provides radio broadcasters their primary revenue stream. The advertisers, in turn, pay for the attention of listeners, who tune-in to hear music, not commercials. Without sound recordings, this chain would be broken, and radio broadcasters would suffer immense losses. As a radio station manager in Los Angeles candidly testified to Congress in 1975, "if it came to dropping ashtrays

and that was a very popular sound, [radio broadcasters] would drop ashtrays."[211]

As noted earlier, recording artists further argue that even if there is a promotional effect to broadcasting, that effect runs to the composers and music publishers as well, who nevertheless receive a public performance right.[212] This contention, however, is significantly weakened by the mechanical license provisions of the Copyright Act. Recall that the royalty paid to owners of musical compositions for the reproduction of their works in recorded form is capped at a specific amount.[213] Owners of sound recording copyrights, however, are not subject to any statutory limitations for income generated through album sales.[214] Compensation from the performance royalty in musical compositions thus serves a legitimate purpose in narrowing that regulatory gap.

Perhaps a stronger argument for the recording industry is that older works, which nevertheless may be widely broadcast, do not fit into the rubric of promotion through public performance. For example, while the Big Bopper's 1958 hit *Chantilly Lace*[215] can be heard throughout the country on countless oldies stations, there is, to be sure, no payola being sent to those stations by the late artist's record company, Mercury. Therefore, while many



listeners tune in to hear that and other such past hits, there is little resulting promotional benefit to sound recording copyright owners. The same holds true for classical stations. They are unlikely to receive payola for playing Glenn Gould's recording of J.S. Bach's *Goldberg Variations*[216] (say, Variation 20), and the sound recording's public broadcast will lead to few, if any, increased CD sales royalties for the Gould estate and Sony Classical.

As an economic matter, older songs do not receive the promotional benefit that may justify the general lack of a performance right in sound recordings. Once the promotional benefit diminishes, the recording industry is left with a considerably stronger argument in calling for a public performance right in sound recordings.[217]

Faced with competing forces influencing the merits of broadcasters' promotional arguments, a unique compromise may be in order. When a sound recording is in its adolescence, subject to massive record sales spurred by widespread radio broadcast, there may be no rational justification for affording a "windfall" to labels and artists in the form of a public performance royalty. Once that initial period has passed, however, a right of equitable remuneration should initiate.

Peter L. Felcher, a New York entertainment lawyer, has suggested such a compromise. Under his approach, the performance right would commence five years after a record's initial release.[218] He reasons, "[t]he vast majority of broadcasters playing a recording after five years will be stations that had nothing to do with originally promoting the recording, who are then doing nothing particularly significant to increase anyone's income other than their own."[219] While the appropriate "grace period" for broadcasters is subject to debate, the sentiment expressed by Mr. Felcher is certainly compelling.[220]

The proposed compromise recognizes the failings of arguments put forth by both sides. The current position of broadcasters ignores the ephemeral nature of airplay's promotional benefit, while that of sound recording copyright owners fails to recognize the initial value of airplay. The most reasonable conclusion is that any new public performance right in sound recordings should be tempered by a statutory "safe harbor" during that period in which sound recording sales are most influenced by radio airplay.

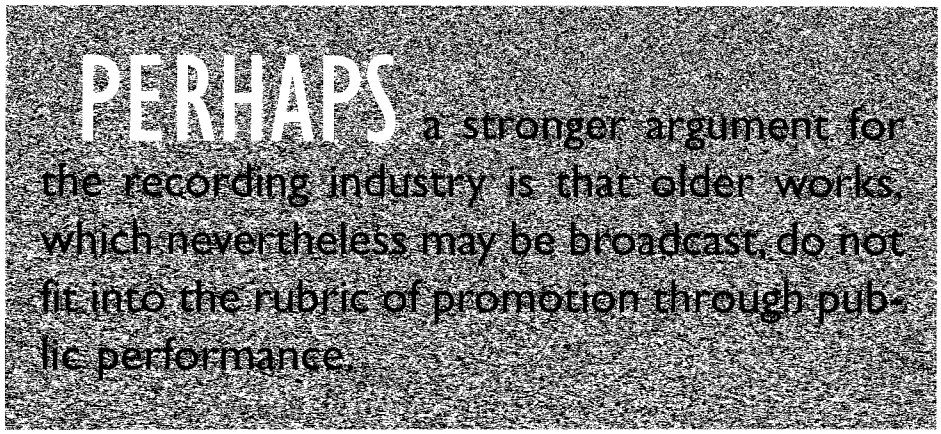
2. A Performance Right Would Bankrupt Radio Broadcasters

Radio broadcasters and similarly aligned stakeholders contend that a general performance right in sound recordings would be unduly burdensome. Specifically, broadcasters argue that with allegedly "substantial" payments totaling about $300 million per year to composers and publishers, they could not possibly afford additional performance royalty obligations.[221] To analyze the merit of the undue burden contention, it is helpful to consider past and present radio broadcasting industry economic data.

The actual financial impact of a general performance royalty on radio broadcasters is, of course, difficult to estimate. It was for the 1978 report of the Register of Copyrights that an extensive economic analysis of this subject was last published.[222] The nature of radio, of course, has changed much since then. Today, the industry is bigger and vastly more consolidated. One large corporation, Clear Channel Communications, with ownership of over 1,200 stations, reaches more than one-third of the American population.[223] It and the next nine largest companies in radio embrace two-thirds of listeners and revenue.[224] At the local level, many markets are dominated by four firms with control of over 70 percent of market share.[225] The consolidation is the result of changes enacted in the Telecommunications Act of 1996 which dramatically deregulated rules regarding ownership of multiple radio stations.[226]

Radio stations have reaped great benefits from the economies of scale achieved as a result of consolidation. As one observer explained, "[o]wners knew that if they could control more than one station in a local market, they could consolidate operations and reduce fixed expenses. Lower costs would mean increased profit potential."[227] Clear Channel, for example, grew from 40 stations before the 1996 Act to 1,225 stations in 2003.[228] In view of Clear Channel's and other conglomerates' decision to purchase thousands of radio stations, it is reasonable to assume that the consolidated business of radio is, in the long term, a profitable enterprise.

Even in the wake of the burst economic "bubble" of the late 1990s, radio's financial health remained in tact. For example, radio's total revenue for 2002 increased by six percent over the 2001 figures, with purely local ad revenue up four percent and national revenue jumping thirteen percent.[229] Radio remains financially strong, and in the past ten years, radio revenue has grown steadily.[230] It is interesting to note that at the peak of the dot-com bubble, radio revenue measured $19.848 billion, but the four quarters preceding October 31, 2003 saw an only slightly smaller figure of $19.575 billion.[231] Moreover, radio's share of overall ad revenue is growing in relation to other media, crossing for the first time in recent years the eight percent media market share barrier.[232] And continued overall growth in the American economy will surely benefit radio broadcasters as well.[233]



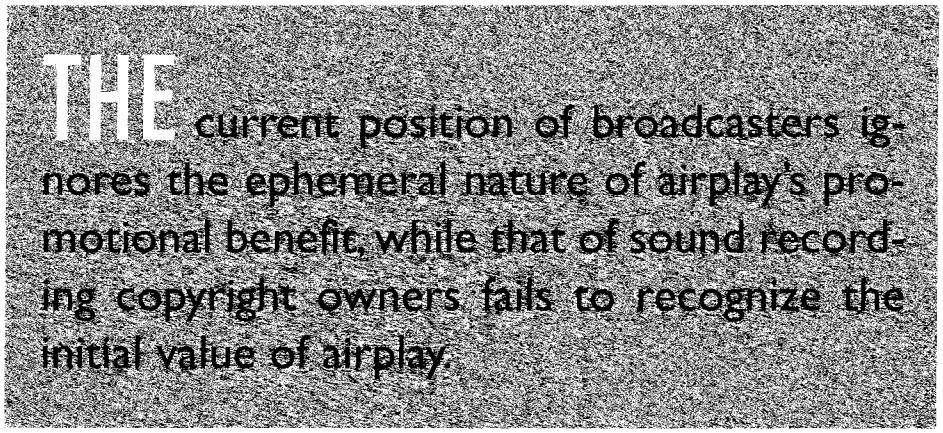
Thus, given the economies of scale reaped by a remarkable consolidation of station ownership and recent figures showing steadily increasing revenue, it appears that the radio industry is poised for a healthy future. The imposition of some form of new performance royalty would therefore not cause significant financial harm for the vast majority of radio broadcasters. Rather, it would involve a change in the current business model, requiring the radio conglomerates to simply decide how best to absorb or pass on added royalty costs.[234]

There is a caveat. Although the industry can certainly pay *a* royalty, it cannot pay at an unconscionable rate. If the rate is set at a level and structure similar to that of the public performance royalty for musical compositions, as occurs in many leading foreign countries,[235] it is sensible to assume

that broadcasters can withstand the effects of new performance fees (a reasonably modest $300 million per year across the industry).[236] If, however, the recording industry were to lobby for and obtain a rate set considerably higher than the musical composition public performance royalty, broadcasters would have a much stronger argument in opposing a new right.

If recent history is any lesson, broadcasters would be justified in assuming that the recording industry may seek unreasonable terms for a new performance right, either in the license structure or in specific royalty rates.[237] For example, in the time between passage of the DPRA and DMCA, the RIAA filed comments with the Copyright Office urging that the recording industry, rather than the government, should have the right to determine the fees to be paid by webcasters.[238] Given the RIAA's suggestion that the rate be set at .4 cents per individual listener reached, a number nearly six times larger than the arguably high .07 cents rate adopted by the Librarian of Congress,[239] webcasters were correct to fear that the lack of a compulsory license would have resulted in unconscionable fees.[240] Note that a .4 cent fee would have cost a large webcaster with an average audience of 40,000 listeners royalties of approximately $23 million per year.[241] Viewed against a historical backdrop under which both mechanical and musical composition performance licensing terms have been successfully administered under the tempering effect of a legislative or judicial lever, the recording industry's request for unbridled power in establishing webcasting rates bordered on the inequitable.[242]

After losing the compulsory license battle, the RIAA did not retreat to a more reasonable position. Although not as high as the amount officially requested by the RIAA, the per-performance rate adopted by the Librarian of Congress was, in some cases, hundreds of times greater than the percentage-of-revenue musical composition royalty required of webcasters by ASCAP and BMI.[243] In the wake of the Librarian's determination, hundreds of webcasters ceased operations. While some faced an uncertain future in any event, many attributed their downfall to the high per-performance sound recording royalty fees.[244] Other webcasters sought to survive by reincorporating abroad.[245] As a result of the closings and relocations, for the first time in history, international webcasters now outnumber channels based in the U.S.[246]



As noted in Part I.B.2.a, the RIAA ultimately yielded and agreed to a percentage-of-revenue formula for small webcasters.[247] It is unlikely that the industry would have capitulated but for an onslaught of intense political pressure.[248] Had the RIAA stuck to the position it held over the previous decade, many additional webcaster bankruptcies and relocations abroad would have occurred as a direct result of performance royalty fees set at a level far above that for the public performance (digital or otherwise) of musical compositions.

While Congress is partly responsible for its decision to instruct the CARP to set a rate on an ambiguous "willing buyer/willing seller" metric,[249] the RIAA bears much of the blame for its distortion of that standard by overestimating the value of the digital public performance license. The experience of fledgling webcasters before a politically powerful recording industry demonstrates the importance of setting any new performance royalty at a genuinely reasonable rate.

3. A New Public Performance Right Would Impose Undue Costs on the Public's Right of Access to Sound Recordings

The age-old response to the incentive argument for a new performance rationale, as described in Part II.A.3, is to emphasize the countervailing costs of the copyright monopoly on the public's right of access to information. Because information (here, music) is a public good,[250] its use by one party does not affect any other party's simultaneous or future use. In light of this reality, the creation of property rights in information imposes a burden on the public.[251] The Copyright Clause of the Constitution explicitly recognizes the danger of such costs, insisting that the grant of the copyright monopoly be tethered to some concomitant public benefit (*i.e.*, the development of future works).[252] In accordance with this basic constitutional principle, opponents of a general public performance right could argue that the costs imposed on the public would outweigh any alleged incentive effect.

A wise strategy for broadcasters would be to attempt a subtle argument, depicting their position "not as a squabble over who would get the benefit of existing works," but rather as a genuine resolution of the "conflict between creation and use."[253] On the creation side, broadcasters could rely on the argument, described in Part II.B.1., that performers and producers already have the necessary incentive to create recordings due to the promise of CD sales. Pointing to the vast quantity of recorded music,[254] they could consequently argue that any additional incentive effect would be unnecessary. On the burden side, however, broadcasters could decry the alleged effects of a new right on the broadcasting industry's competitive welfare, as described above in Part II.B.2.

The strength and credibility of the social costs claim is entirely dependent on the broadcasters' ability to establish its other primary arguments. Like the recording industry's opposing incentive argument, the social costs rationale is thus unlikely to be persuasive on its own right. Yet backed by the inertia of the status quo, this argument could be helpful in persuading policymakers to oppose any new performance right in sound recordings.

IV. What Should a Public Performance Right in Sound Recordings Look Like?

In the sound recording performance rights debate, positions advocated by broadcasters are the polar opposite of those taken by recording artists and labels. Considering all the factors, it is likely that neither claim is entirely meritorious. Both are too extreme to be supported by available evidence.

Radio broadcasters ignore what would amount to at least some international harmonization and added foreign royalties, as well as the potential creation of new works that would not be economically viable without a performance royalty. Furthermore, broadcasters fail to adequately account for the possible inequity of granting performance royalties to those who compose music but not to the artists and record labels who help bring that music to life. Lastly, claims of an inability to afford *any* new performance royalty seem hollow considering the strength of the newly consolidated American radio industry.

On the other extreme, supporters of a performance right in sound recordings have asked for too much. They overestimate the international harmonization and royalty effects of the right, given that many countries could choose to opt-out of the Rome Convention's performance royalty obligations if faced with

GIVEN the economics of scale reaped by a remarkable consolidation of station powership and recent figures showing steadily increasing revenue, it appears that the radio industry is poised for a healthy future.

a sudden upsurge in the outflow of payments to the U.S.[255] The recording industry's otherwise viable fairness arguments are diluted by the widespread practice of payola, demonstrating that radio airplay serves a key promotional benefit for the sale of new sound recordings. Also, supporters of a new performance right have not yet indicated the size of the corresponding royalty rate. That omission is not insignificant. An excessive rate could lead to socially harmful industry exit, as evidenced by the precedent of the RIAA's treatment of fledgling webcasters.

While it is evident that neither side's position is entirely accurate, one thing is clear: currently, broadcasters are winning the debate over performance rights in sound recordings. As discussed in Part I.B.2, the adoption of a digital performance right in sound recordings did not provide a significant net gain to artists and labels. Although the digital performance royalty has likely been set at a rate that overcompensates for the substitution effect,[256] the excess performance royalties do not amount to the roughly $300 million paid out each year by broadcasters to the copyright owners of musical compositions.[257] It is therefore not appropriate to rely on the digital performance right in gauging the status of the debate regarding general performance royalties for traditional methods of public performance.

Congress should pass an amendment to the Copyright Act approaching, but not reaching, a general performance right in sound recordings. While reform is warranted, U.S. copyright law should not succumb to the efforts of the recording industry to achieve an unencumbered general performance right in sound recordings. Only a performance right that recognizes the value of radio airplay to the standard business plan of record companies, and that closely mirrors the structure of the performance royalty for musical compositions, can be justified on an equitable basis. Congress should repeal section 114(a) of the Copyright Act and enact a public performance right in sound recordings, yet ought do so only if limiting that right with a compulsory license, a ceiling on the royalty rate tethered to that charged for the ASCAP/BMI musical composition licenses, and a statutory "safe harbor" during which period new sound recordings could be publicly performed without remuneration to record labels or artists.

ENDNOTES

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[1] *Hearings Before the House Comm. on Patents on General Revision of Copyright Law*, 72d Cong. (1932).

[2] FRANK SINATRA, *Come Fly With Me, on* COME FLY WITH ME (Capitol Records 1958).

[3] 17 U.S.C. § 106(4) (Supp. I 2003).

[4] 17 U.S.C. §§ 106(6), 114(a) (Supp. I 2003). Capitol does, however, have a more limited reproduction right in the sound recording itself.

[5] *See generally* Steven Fraser, *The Copyright Battle: Emerging International Rules and Roadblocks on The Global Information Infrastructure*, 15 J. MARSHALL J. COMPUTER & INFO. L. 759, 770 (1997).

[6] A search for scholarly work regarding the U.S.'s lack of a general public performance right in sound recordings reveals the following articles from the last ten years alone: Jonathan Franklin, *Pay to Play: Enacting a Performance Right in Sound Recordings in the Age of Digital Audio Broadcasting*, 10 U. MIAMI ENT. & SPORTS L. REV. 83 (1993); William H. O'Dowd, *The Need for a Public Performance Right in Sound Recordings*, 31 HARV. J. LEGIS. 249 (1994); Rebecca F. Martin, *The Digital Performance Right in the Sound Recordings Act of 1995: Can It Protect U.S. Sound Recording Copyright Owners in a Global Market*, 14 CARDOZO ARTS & ENT. L.J. 733 (1996); Jeffrey A. Abrahamson, *Tuning Up for a New Musical Age: Sound Recording Copyright Protection in a Digital Environment*, 25 AIPLA Q.J. 181 (1997); John R. Kettle III, *Dancing to the Beat of a Different Drummer: Global Harmonization —And the Need for Congress to Get in Step with a Full Public Performance Right for Sound Recordings*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1041 (2002). *See also* Fraser, *supra* note 5.

[7] Kettle, *supra* note 6, at 1042.

[8] O'Dowd, *supra* note 6, at 249.

[9] Kettle, *supra* note 6, at 1048.

[10] Steven J. D'Onofrio, *In Support of Performance Rights in Sound Recordings*, 29 UCLA L. REV. 168, 170 (1982).

[11] *See, e.g.*, H.R. 1805, 97th Cong. (1981); H.R. 997, 96th Cong. (1979); H.R. 6063, 95th Cong. (1977); H.R. 8015, 94th Cong.

(1975); H.R. 7750, 94th Cong. (1975); H.R. 7059, 94th Cong. (1975); H.R. 5845, 94th Cong. (1975); S. 1111, 94th Cong. (1975); H.R. 14636, 93d Cong. (1974); H.R. 15522, 93d Cong. (1974); H.R. 14922, 93d Cong. (1974); H.R. 8186, 93d Cong. (1974); S.1361, 93d Cong. (1973); S. 644, 92d Cong. (1971); S. 543, Amdt. No. 9, 91st Cong. (1969); S. 597, Amdt. No. 131, 90th Cong. (1967); H.R. 2464, 82d Cong. (1951); H.R. 1270, 80th Cong. (1947); S. 1206, 79th Cong. (1945); H.R. 3190, 79th Cong. (1945); H.R. 1570, 78th Cong. (1943); H.R. 9703, 76th Cong. (1940); H.R. 7173, 77th Cong. (1942); H.R. 4871, 76th Cong. (1939); S. 2240, 75th Cong. (1937); H.R. 52745, 75th Cong. (1937); H.R. 11420, 74th Cong. (1936); H.R. 10632, 74th Cong. (1936); H.R. 10976, 72d Cong. (1932); H.R. 10740, 72d Cong. (1932); H.R. 10364, 72nd Cong. (1932); H.R. 12549, 71st Cong. (1930); H.R. 10434, 69th Cong. (1926).

[12] *This Week's News*, AUDIO WEEK, Nov. 6, 1995 (quoting an RIAA spokesperson as calling enactment of the Digital Performance Rights Act a "landmark" development).

[13] *See* Kettle, *supra* note 6. In his article, Prof. Kettle concludes, "[I]t has taken almost a century for Congress to recognize a public performance right in sound recordings, albeit partial. Congress should now work diligently to make up for lost time and lost opportunity, and adopt the full public performance right for recorded music." *Id.* at 1088.

[14] 17 U.S.C. § 102(2)(a)(2) (1996).

[15] 139 CONG. REC. E1724-01 (July 1, 1993) (Material in Extension of Remarks, Digital Performance Right in Sound Recordings Act of 1993, Hon. William J. Hughes).

[16] 17 U.S.C. §§ 106(1)-(3) (1996).

[17] *See, e.g.*, DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 257-72 (Simon & Schuster 2000) (1991).

[18] 17 U.S.C. § 106(1), (3) (1996). It is also possible to trigger the musical composition copyright owner's exclusive right to produce a derivative work. § 106(2).

[19] 17 U.S.C. § 101 (Supp. I 2003).

[20] JAY ALTHOUSE, COPYRIGHT: THE COMPLETE GUIDE FOR MUSIC EDUCATORS, 61 (1997).

[21] *Id.*

[22] *Id.*

[23] *Id.* at 62.

[24] Note that in 1908, the Supreme Court issued its now-infamous decision in *White-Smith Music Publishing Co. v. Apollo Co.*, nearly obliterating the emerging licensing market for the embodiment of musical compositions in piano rolls. Finding the rolls to not be "copies" of their underlying musical works, the Court focused on the fact that the perforated rolls did not depict the composition in a form of "intelligible notation" to the human eye. Thus, musical compositions in piano rolls were taken (briefly) out of the realm of copyright protection. The Court recognized that its decision may have enabled manufacturers of the rolls to "enjoy the use of musical compositions for which they pay no value." It directed such concerns, however, to "the legislative, and not the judicial, branch of the government." White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1, 17-18 (1908).

[25] H.R. REP. NO. 94-1476, at 108 (1976).

[26] *Id.*

[27] Recording Indus. Assoc. of America v. Copyright Royalty Tribunal, 662 F.2d 1 (D.C. Cir. 1981) (citing 17 U.S.C. § 115 (1976)).

[28] As compensation, Congress set a rate of two cents per "part" (record) produced, and the rate remained at that level until 1976. To correct the absurdity of the rate stagnancy, Congress in the 1976 Copyright Act increased the rate and established the Copyright Royalty Tribunal. *See* 17 U.S.C. § 801. Although the 1976 Act only increased the rate to 2.75 cents per phonogram, future adjustments were to be made as appropriate. *See* 17 U.S.C. §§ 115(c)(2), 801(b) (1976). Effective January 1, 2004, the mechanical license rate is set at 8.5 cents per song, or 1.65 cents per minute of playing time or fraction thereof, whichever is greater. Copyright Office, Copyright Royalty Rates: Section 115, The Mechanical License, *available at* http://www.copyright.gov/carp/m200a.html (Jan. 8, 2003). This figure was determined in 1997, at a proceeding in which representatives of the Recording Industry Association of America (RIAA), National Music Publishers' Association (NMPA), and Songwriters Guild of America participated. *See* Irv Lichtman, *Mechanicals Talks on Track; Parties Nearer Agreement on New Rate*, BILLBOARD, Apr. 12, 1997, at 3.

[29] Drew Clark, *A Battle Over Internet Royalties*, NAT'L J., Dec. 14, 2002, *available at* 2002 WL 26794600 (quoting a figure of $691 million in mechanical royalties in 2001).

[30] Note that the Harry Fox Agency (HFA) administers most of the mechanical license uses in the U.S. It is a wholly owned subsidiary of the NMPA, which represents over 800 music publishers. After collecting mechanical royalties from record labels and/or artists, HFA then distributes the payments to its musical composition-copyright owner members. *See* Harry Fox Agency, HFA's Frequently Asked Questions, *at* http://www.nmpa.org/hfa/faq_mechanical.html (last visited Feb. 22, 2004).

[31] *See* BRUCE P. KELLER & JEFFREY P. CUNARD, COPYRIGHT LAW: A PRACTITIONER'S GUIDE § 4:1.4 (2001) (citing 17 U.S.C. § 106(4) (1996)).

[32] 17 U.S.C. § 101 (Supp. I 2003). *See also* ASCAP, About ASCAP Licensing, *at* www.ascap.com/licensing/about.html (last visited Feb. 22, 2004).

[33] As ASCAP describes on its website, "[I]n the U.S., the primary types of music use which generate performance royalties are feature performances (a visual vocal or visual instrumental on TV, a radio performance of a song, etc.), underscore on television series, specials, movies of the week and feature films, theme songs to TV series, TV logos and

promos, advertising jingles, and copyrighted arrangements of public-domain compositions." ASCAP, Music and Money: Performing rights payments, *at* http://www.ascap.org/musicbiz/money-payments.html (last visited Feb. 23, 2004) [hereinafter ASCAP, Music and Money].

[34] Kettle, *supra* note 6, at 1046 (citing *Copyright Protection on the Internet: Hearing on H.R. 2441 Before the House Comm. on the Judiciary*, 104th Cong. (1996) (testimony of Francis W. Preston, President & CEO of Broadcast Music, Inc.)).

[35] *See* Frank Saxe, *Navigating Digital World Requires New Maps*, BILLBOARD, May 26, 2001, at 1 (quoting payments of broadcasters to ASCAP and BMI of approximately $300 million per year).

[36] ALTHOUSE, *supra* note 20, at 71.

[37] *Id.*

[38] *Id.*

[39] *Id.* at 72.

[40] Act of Jan. 6, 1897, ch. 4, 29 Stat. 481. *See also* RUSSELL SANJEK & DAVID SANJEK, PENNIES FROM HEAVEN, xv (1996) (explaining that the 1897 revision of the Copyright Act "added the words '*and musical*' to the statute enacted in 1856 extending protection to dramatists against unlicensed public performance of their work. This change specifically covered the kind of dramatic performances – operas, farces, extravaganzas, and other forms of musical theater – popular in the period.") (emphasis in original).

[41] ALTHOUSE, *supra* note 20, at 71.

[42] *See* Broadcast Music Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 4 (1979).

[43] *Id.*

[44] SANJEK & SANJEK, *supra* note 40, at xv (citing *Trust for Control of Music Business: ASCAP Organized at Meeting Here*, N.Y. TIMES, Feb. 14, 1914).

[45] *Id.*

[46] *Broadcast Music Inc.*, 441 U.S. at 5.

[47] Edward Morris, *SESAC Plots a Competitive Course: Group to Base Payments on BDS Data*, BILLBOARD, Oct. 30, 1993, at 9.

[48] ASCAP, *supra* note 33.

[49] *Broadcast Music Inc.*, 441 U.S. at 5.

[50] ASCAP, Music and Money, *supra* note 33.

[51] ALTHOUSE, *supra* note 20, at 80.

[52] *See* William Fisher, *Promises to Keep: Technology, Law, and the Future of Entertainment* ch. 2, p. 19 (Mar. 2, 2003) (work in progress) (on file with the author) [hereinafter Fisher, Promises to Keep].

[53] *See, e.g.*, CHARLES D. FERRIS & FRANK W. LLOYD, TELECOMMUNICATIONS REGULATION: CABLE, BROADCASTING, SATELLITE AND THE INTERNET § 7 (2002).

[54] *Broadcast Music Inc.*, 441 U.S. at 5.

[55] *Id.*

[56] ASCAP, Frequently Asked Questions About Licensing, *at* http://www.ascap.com/licensing/radio/radiofaq.html (last visited Feb. 23, 2004).

[57] Clark, *supra* note 29.

[58] ALTHOUSE, *supra* note 20, at 81. On the subject of royalty distributions, Althouse writes, "[T]oday it takes a small army of economists, mathematicians, consultants, and judges armed with computers, diaries, logs, and regional issues of *TV Guide*." *Id.*

[59] ASCAP, ASCAP DISTRIBUTION RESOURCE DOCUMENTS 1 (2002).

[60] United States v. American Soc'y of Composers, Authors and Publishers, 1940-43 Trade Cases ¶ 56, 104 (S.D.N.Y. 1941); United States v. Broadcast Music, Inc., 1966 Trade Cases (CCH) ¶ 71,941 (S.D.N.Y. 1966). For more information on the development of the rate court consent decrees, *see* FERRIS & LLOYD, *supra* note 53, at § 7.

[61] United States of America v. American Soc'y of Authors, Composers and Publishers, Civ. Action No. 41-1395, at 13 (S.D.N.Y. June 11, 2001) (Second Amended Final Judgment).

[62] Martin, *supra* note 6, at 737; 17 U.S.C. §§ 106(1)-(3), (6) (1996 & Supp. 1 2003).

[63] Congress extended copyright protection to composers of musical works in 1831. *See* ALTHOUSE, *supra* note 20, at 23.

[64] Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391 (1971).

[65] H.R. REP. No. 92-487, at 1568 (1971). Record piracy refers generally to the illegal duplication and distribution of sound recordings. *See, e.g.*, RIAA, Piracy, *at* http://www.riaa.com/issues/piracy/default.asp (last visited Feb. 23, 2004).

[66] SANJEK & SANJEK, *supra* note 40, at 564.

[67] *Id.*

[68] Copyright Arbitration Royalty Panel, Library of Congress, In the Matter of Digital Performance Right in Sound Recordings and Ephemeral Recordings, Docket No. 2000-9 CARP DTRA 1&2, at 8 (2000) (testimony of William W. Fisher III) [hereinafter Fisher testimony].

[69] Recording Industry Association of America, 2002 Yearend Statistics, *at* http://www.riaa.com/news/marketingdata/pdf/year_end_2002.pdf (last visited Feb. 23, 2004).

[70] KELLER & CUNARD, *supra* note 31, at § 10:4.2.

[71] H.R. REP. NO. 92-487, at 1568 (1971).

[72] 17 U.S.C. § 114(a) (Supp. I 2003).

[73] S. REP. NO. 94-1058 (1976). *See also supra*, note 40 and accompanying text.

[74] Bill Holland, *Music Business Urges Congress to Adapt Performance Right*, BILLBOARD, Apr. 3, 1993, at 6 ("For the first time in 12 years, the U.S. record industry officially asked Congress March 25 to create a performance right in sound recordings, saying near-future digital delivery systems could severely hurt the industry unless there are [new] copyright safeguards.")

[75] Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (1995).

[76] *Id.*

[77] *Id.*

[78] Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

[79] H.R. REP. NO. 104-274, at 3 (1995).

[80] *Id.*

[81] *Id.*

[82] 2-8 MELVILLE NIMMER, NIMMER ON COPYRIGHT § 8.21 (2002).

[83] *Id.*

[84] SENATE COMM. ON THE JUDICIARY, REPORT ON THE DIGITAL PERFORMANCE RIGHT IN SOUND RECORDINGS ACT OF 1995 (1995), *reprinted in* 10-46 MELVILLE NIMMER, NIMMER ON COPYRIGHT app. at 46 (2002) [hereinafter REPORT ON THE DIGITAL PERFORMANCE RIGHT IN SOUND RECORDINGS ACT].

[85] 17 U.S.C. § 114(d)(3) defines an "interactive service" as one that enables a user to receive a transmission of a particular sound recording selected by or on behalf of the end recipient.

[86] REPORT ON THE DIGITAL PERFORMANCE RIGHT IN SOUND RECORDINGS ACT, *supra* note 84, at 14 (explaining that although some noninteractive services would trigger the exclusive right in sound recordings, they would nevertheless be eligible for a statutory license).

[87] Fisher testimony, *supra* note 68, at 17.

[88] REPORT ON THE DIGITAL PERFORMANCE RIGHT IN SOUND RECORDINGS ACT, *supra* note 84, at 46.

[89] 17 U.S.C. § 114(d)(2) (Supp. I 2003).

[90] § 114(f).

[91] § 114(f)(2)(b).

[92] At that point, any party to the proceeding who is dissatisfied with the Librarian's determination may appeal to the U.S. Court of Appeals for the District of Columbia Circuit. *See* § 802(g).

[93] Report of the Copyright Arbitration Royalty Panel, In the Matter of Rate Setting for Digital Performance Right in Sound Recordings and Ephemeral Recordings, CARP DTRA 1&2, Docket No. 2000-9 at 7 (2002) [hereinafter "Report of the CARP"].

[94] *See, e.g.*, Saxe, *supra* note 35, at 1.

[95] For more specific information on the CARP proceedings, see FERRIS & LLOYD, *supra* note 53, at § 7.

[96] Report of the CARP, *supra* note 93, at 31.

[97] *Id.* at 27.

[98] *See* Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings, 67 Fed. Reg. 45239, 45246 (Copyright Office, July 8, 2002) ("The Panel also carefully considered and rejected a percentage-of-revenue model for assessing fees and determined that a per performance metric was preferable to a percentage-of-revenue model.").

[99] Report of the CARP, *supra* note 93, at 37. Furthermore, the CARP expressed fear that a percentage-of-revenue model could result in little or no compensation to the sound recordings owners and artists, as many webcasters "are currently generating very little revenue." *Id.*

[100] ASCAP, *supra* note 33.

[101] Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings, 67 Fed. Reg. 45240 (Copyright Office, July 8, 2002) (codified at 37 C.F.R. § 261).

[102] *Id.* at 45243.

[103] *Id.* at 45262. This determination covers the period from October 28, 1998 to August 31, 2002. *See id.* at 45274; *See also* Letter from SoundExchange to Section 112 and 114 Statutory Licensees (Sept. 25, 2002), *available at* http://www.soundexchange.com/letter_webcasters.pdf (last visited Sept. 13, 2003) [hereinafter SoundExchange Letter].

[104] Press Release, Digital Media Association, Internet Radio Companies Appeal Royalty Decision (Aug. 7, 2002), *available at* http://www.digmedia.org/webcasting/appeal.html (last visited Feb. 24, 2004).

[105] SoundExchange Letter, *supra* note 103.

[106] *Id.*

[107] Small Webcaster Settlement Act of 2002, Pub. L. No. 107-321, 116 Stat. 2780 (2002). Congress's dissatisfaction with

the CARP process has been palpable. By a vote of 406-0, the House of Representatives recently passed a bill replacing the CARP with a panel of three administrative law judges to be chosen by the Librarian of Congress. H.R. 1417, 108th Cong. (2004). Leading proponents of the bill cited the webcaster CARP in criticizing the CARP as a "royalty system that is anything but fair." *House Votes to Reform Copyright Arbitration Process*, COMM. DAILY, March 4, 2004, at 9. The Committee report to H.R. 1417 reports the frequent complaint that CARP arbitrators "lack appropriate expertise to render decisions and frequently reflect either a 'content' or 'user' bias." H.R. REP. NO. 108-408, at 18 (2004). Unlike the private arbitrators in CARP proceedings, the new administrative law judges will be chosen based on their backgrounds in copyright, economics, and arbitration. COMM. DAILY, at 9. The bill, known as the Copyright Royalty and Distribution Reform Act of 2004, is now awaiting consideration by the Senate Committee on the Judiciary.

[108] *SoundExchange Webcasting Rates May Avoid CARP*, PRO SOUND NEWS, May 1, 2003, at 16. The rates are similar to those decided by the Librarian of Congress in the last CARP: 0.0762 cents per performance, 1.17 cents per aggregate tuning hour, or 10.9 percent of gross revenues for subscription services.

[109] *Copyright Treaties Implementation Act: Hearing before the Subcomm. on Telecommunications, Trade, and Consumer Protection of the House Commerce Comm.*, 105th Cong. (June 5, 1998) (statement of Hilary B. Rosen) ("[Y]ou have before you an unparalleled opportunity to foster and sustain U.S. competitiveness in the coming century in a sector whose importance to this National far exceeds its economic output.").

[110] Chuck Taylor, *The Hopes & Hurdles of the Web*, BILLBOARD, Nov. 6, 1999, at 1.

[111] Kettle, *supra* note 6, at 1070.

[112] 17 U.S.C. § 114(j)(5) (Supp. I 2003). Note that Congress also subjected the emerging satellite digital radio services (DARS) to the public performance right and compulsory license regime. 17 U.S.C. § 114(d)(2). As a result, the two licensed DARS providers, XM Satellite Radio and Sirius, must pay sound recording copyright owners a prenegotiated public performance fee for each song they air. Traditional radio broadcasters are already far more seriously challenged by XM and Sirius than they have ever been by webcasters. After less than three years on the air, XM has over 1,360,000 subscribers to its monthly service, while Sirius has a growing base of 260,000 subscribers. *See* Brad Stone, *Greetings Earthlings: Satellite radio for cars is taking off and adding new features - now broadcasters are starting to fight back*, NEWSWEEK, Jan. 26, 2004, at 55. As a recent *Newsweek* article reported, "[t]raditional radio broadcasters... are growing increasingly alarmed by [satellite radio's] popularity and plans for expansion." *Id.* To foster a competitive market in this battle for listeners, the argument for a public performance right that does not unfairly advantage terrestrial broadcasters may prove to be particularly compelling.

[113] Background music services were similarly exempted from the right. *See* Bill Holland, *Agreement Paves Way for Senate Performance Right Bill*, BILLBOARD, July 8, 1995, at P1.

[114] NIMMER, *supra* note 82, at § 8.21.

[115] As Nimmer explains, "Instead of simply amending that feature to add sound recordings (or a subset of eligible sound recordings) to the works that could claim a public performance right, Congress added a new paragraph to Section 106 conferring the right, 'in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.'" *Id.*

[116] *Id.* (citing *Digital Performance Right in Sound Recordings Act of 1995: Hearings before the Senate Comm. on the Judiciary*, 104th Cong. (1995)).

[117] Note that despite the benefit to be conferred to certain sound recording owners and artists in the DPRA and DMCA, Congress maintained the position that "longstanding business and contractual relationships among record producers and performers, music composers and publishers and broadcasters... have served all of these industries well." H.R. REP. NO. 104-274, at 11 (1995).

[118] *See* Fisher testimony, *supra* note 68, at 16. Testifying at the request of the webcasters, Prof. Fisher explained why Congress limited the digital public performance right via a compulsory license for noninteractive services, noting that "in contrast to downloading and on-demand streaming, these ancillary systems pose less danger to the [traditional] revenue streams of copyright owners." Although Congress believed that webcasting would have some promotional effect on the sales of authorized recordings, it "was apparently viewed as possible that such services might reduce somewhat consumer demand for sales of authorized recordings through the 'substitution' effect." Thus, given the indeterminacy regarding the net result of webcasting, Fisher testified that "it made sense for Congress to place [webcasting] in an intermediate category – not subject to an unconstrained public-performance right, like on-demand streamers, but also not altogether exempt from such a right, like traditional broadcasters." *Id.* at 9-10.

[119] *See, e.g.*, Andrea E. Bates, *Webcasters Face Retroactive Royalties in October*, NAT'L L.J., Sept. 23, 2002, at B8 ("Due to the expansive nature of the Internet and 'free' availability of music over the Internet, the recording industry pushed for statutory protections of its revenue stream, via amendments to the Copyright Act. The recording industry feared that if listeners had free access to music, they would no longer purchase CDs, and without CD sales, the owner of a sound-recording copyright would not be compensated because its royalties were based upon revenues from album sales.")

[120] Fisher testimony, *supra* note 68, at 10.

[121] Saxe, *supra* note 35.

[122] NIMMER, *supra* note 82, at § 8.21.

[123] *See, e.g.*, Joshua D. Levine, Note, *Dancing to a New Tune, A Digital One: The Digital Performance Right in Sound Recordings Act of 1995*, 20 SETON HALL LEGIS. J. 624, 643-44 (1996). Commenting on the DPRA, Levine writes, "[b]ased on the fact that roughly forty percent of the music reproduced and distributed internationally comes from the United States, American artists and record companies could conceivably benefit a substantial windfall from this newly opened arena." *Id.*

[124] Kettle, *supra* note 6, at 1080-81.

[125] Eldred v. Ashcroft, 537 U.S. 186, 195 (2003) (citing H.R. REP. No. 94-1476, 94th Cong., at 135 (1976)).

[126] *Id.* Also demonstrating the push towards global harmonization is America's accession to the Berne Convention for the Protection of Literary and Artistic Works, the largest and most influential international copyright convention. As prerequisite to membership in Berne, the U.S. agreed to relax copyright notice and registration requirements. *See* Martin, *supra* note 6, at 751; S. REP. No. 100-352, at 12 (1988). Commentators have hailed this move as an "important step toward global harmonization of intellectual property laws." Kettle, *supra* note 6, at 1077.

[127] Kettle, *supra* note 6, at 1077.

[128] Marc Jacobson, *U.S. Should Get in Step with Other Nations; The Case for a Performance Royalty*, BILLBOARD, May 9, 1992, at 7.

[129] *See, e.g.*, Bonnie Teller, *Toward Better Protection of Performers in the United States: A Comparative Look at Performers' Rights in the United States, Under the Rome Convention and in France*, 28 COLUM. J. TRANSNAT'L L. 775 (1990); D'Onofrio, *supra* note 10, at 177; O'Dowd, *supra* note 6, at 261. As Jason Berman, past president of the RIAA proclaimed, "[t]he current situation undercuts U.S. credibility by forcing the U.S. to take positions on international obligations with respect to sound recordings to protect our industry throughout the world that differ from our own law." *Hearing on H.R. 1506, The Digital Performance Right in Sound Recording Act of 1995, Before the Judiciary Subcomm. on Courts & Intellectual Property*, 104th Cong. (June 21, 1995) (testimony of Jason S. Berman, Chairman and CEO Recording Industry Association of America), *available at* http://www.house.gov/judiciary/489.htm (last visited Feb. 24, 2004) [hereinafter Testimony of Jason S. Berman].

[130] International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Oct. 26, 1961, 496 U.N.T.S. 43, *available at* http://www.wipo.int/clea/docs/en/wo/wo024en.htm (last visited Feb. 24, 2004) [hereinafter Rome Convention].

[131] *Id.*

[132] *Id.* at art. 12.

[133] REGISTER OF COPYRIGHTS, HOUSE SUBCOMM. ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE OF THE HOUSE JUDICIARY COMM., 95TH CONG., PERFORMANCE RIGHTS IN SOUND RECORDINGS, 38 (Comm. Print 1978) [hereinafter 1978 Report].

[134] Teller, *supra* note 129, at 776.

[135] World Intellectual Property Organization (WIPO), *Intellectual Property Protection Treaties: Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Contracting Parties, available at* http://www.wipo.int/treaties/en/documents/pdf/k-rome.pdf (last visited Feb. 24, 2004) [hereinafter WIPO]. WIPO reports that the following nations are signatories to the Rome Convention: Albania, Argentina, Armenia, Australia, Austria, Barbados, Belarus, Belgium, Bolivia, Brazil, Bulgaria, Burkina Faso, Canada, Cape Verde, Chile, Colombia, Congo, Costa Rica, Croatia, Czech Republic, Denmark, Dominica, Dominican Republic, Ecuador, El Salvador, Estonia, Fiji, Finland, France, Germany, Greece, Guatemala, Honduras, Hungary, Iceland, Ireland, Israel, Italy, Jamaica, Japan, Kyrgyzstan, Latvia, Lebanon, Lesotho, Liechtenstein, Lithuania, Luxembourg, Mexico, Monaco, Netherlands, Nicaragua, Niger, Nigeria, Norway, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Republic of Moldova, Romania, Russian Federation, Saint Lucia, Serbia and Montenegro, Slovakia, Slovenia, Spain, Sweden, Switzerland, Togo, the former Yugoslav Republic of Macedonia, Ukraine, United Kingdom, Uruguay, and Venezuela. *Id.*

[136] Franklin, *supra* note 6, at 113.

[137] Martin, *supra* note 6, at 753.

[138] Franklin, *supra* note 6, at 114.

[139] Kettle, *supra* note 6, at 1075. Similarly, in 1995, President Clinton's Working Group on Intellectual Property Rights admonished that due to the lack of a U.S. performance right, "U.S. performers and record companies are denied their fair share of foreign royalty pools." INFORMATION INFRASTRUCTURE TASK FORCE, WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 222-23 (1995).

[140] Jacobson, *supra* note 128, at 7.

[141] Teller, *supra* note 129, at 790.

[142] Press Release, Office of the United States Trade Representative, USTR Kantor Initiates WTO Dispute Settlement Proceedings Against Japan for Its Sound Recording Copyright Practices (Feb. 9, 1996) (on file with author).

[143] Rome Convention, *supra* note 130, at art. 16(1)(a)(1) (emphasis added).

[144] WIPO, *supra* note 135. The following countries have elected to opt-out of Article 12: Australia, Congo, Estonia, Fiji, Finland, Iceland, Luxemburg, Monaco, Niger, Poland, Slovenia, and the former Yugoslav Republic of Macedonia. *Id.*

[145] International Federation of Phonogram and Videogram Producers (IFPI), *Global Music Sales Down 5% in 2001*, Apr. 26, 2002, *at* http://www.ifpi.org/site-content/statistics/worldsales.html (last visited Feb. 24, 2004). IFPI notes that the UK and France are "two major markets." *Id.*

[146] In *Gramophone Co. Ltd. v. Stephen Cawardine & Co.*, the owner of the copyright in a recorded rendition of Auber's *Black Domino* overture successfully argued that the 1911 U.K. Copyright Act provided for an independent public performance right in the sound recording, separate and apart from the performance right in the musical work. *See* J.A.L. Sterling, Intellectual Property Rights in Sounds Recordings, Film & Video 312-13 (1992). The 1911 U.K. Copyright Act stated that "copyright shall subsist in records... by means of which sounds may be mechanically reproduced, in like manner as if such contrivances were musical works." *Id.*

[147] British Phonographic Industry Ltd. (BPI), Market Information, *at* http://www.bpi.co.uk/pdf/Trade_Del_Q3-03.pdf (last visited Feb. 24, 2004).

[148] Law No. 85-660 of July 3, 1985, J.O., July 4, 1985, Title II, art. 18.

[149] For example, in a 1964 case, *Furtwangler v. Societes Thalia & Urania*, the *Cour de cassation*, France's High Court, held that performers have the right to prohibit the unauthorized use of their performances. *See* J.A.L. Sterling, World Copyright Law: Protection of Author's Works, Performances, Phonograms, Films, Video, Broadcasts and Published Editions in National, International and Regional Law 1035 (1998), (citing Furtwangler v. Societes Thalia and Urania, (Cour de cassation, Ch. Civ., Jan. 4, 1964, Gaz. Pal. Jan. 25-28, 1964)). An earlier case, *Fedor Ivanovitch*, recognized a recording company as having a right of "literary and artistic property" in its recording. *See id.* (citing Fedor Ivanovitch (Mar. 15, 1957, J.C.P. 1957 II.10.210).

[150] Emmanuel Legrand, *CD-R Piracy Hits French Record Sales*, Billboard, Feb. 10, 2001, at 53 (quoting sales of sound recordings in 2000 of 7.379 billion francs).

[151] Canada officially became a party to the Rome Convention on June 4, 1998. WIPO, *supra* note 135; I-CAN Int'l Copyright Law and Practice § 3 (2002).

[152] Migration Policy Institute, US-Canada-Mexico Trade Fact Sheet, *at* http://www.migrationpolicy.org/pubs/us_mex_can_facts.html (last visited Feb. 24, 2004).

[153] 1978 Report, *supra* note 133, at 6.

[154] Jonathan S. Shapiro et al., *Canada Enacts New Copyright Laws*, J. Proprietary Rts, July 1997, at 21. Note that the performance right was re-introduced as part of a decade-long effort to modernize Canada's copyright law. *See* Kimberly Hancock, *Canadian Copyright Act Revisions*, 13 Berkeley Tech. L.J. 517, 523 (1998).

[155] Copyright Act, R.S.C., ch. C-42, § 68.1 (1997) (Can.).

[156] Proceedings of the Standing Senate Comm. on Transport and Communications, Ninth Report (Apr. 21, 1997) (Can.), *available at* http://www.parl.gc.ca/english/senate/com-e/tran-e/17rp-e.htm (last visited Feb. 25, 2004) [hereinafter Proceedings of the Standing Senate Comm. on Transport and Communications].

[157] *See* Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings, 67 Fed. Reg. 45262 (Copyright Office, July 8, 2002) (codified at 37 C.F.R. § 261).

[158] 1978 Report, *supra* note 133, at 6.

[159] Shapiro, *supra* note 154.

[160] Proceedings of the Standing Senate Committee on Transport and Communications, *supra* note 156. That 1997 recommendation of the Committee is reminiscent of an advisory report issued two decades earlier to the Canadian government, counseling the re-adoption of a sound recording performance right *only as to Canadian recordings*. *See* 1978 Report, *supra* note 133, at 6. ("A 1977 advisory report to the Canadian Government has recommended that performance rights be reinstated, but that they apply only to Canadian recordings.")

[161] *See supra* notes 136-144 and accompanying text.

[162] O'Dowd, *supra* note 6, at 263.

[163] Franklin, *supra* note 6, at 115.

[164] A typical statement proclaims that "[f]or the health of our recording industry at home and for the sake of our tremendous role in the export of sound recordings to be performed abroad," the U.S. must ascend to the Rome Convention. *See* Jacobson, *supra* note 128, at 7.

[165] In 2001, Billboard reported the 10 largest recording markets in the following order: U.S., Japan, U.K., Germany, France, Canada, Brazil, Mexico, Spain, and Australia. *See* Tom Ferguson, *Korea, India, Rejoin Top Twenty Music Markets*, Billboard, May 5, 2001, at 43. Note that despite the proximity of France and Canada on the list, the market for CD sales in the former is over 56% greater than that found in the latter. Of course, most of the Rome Convention signatories do not fall within the Billboard list. *See* WIPO, *supra* note 135.

[166] D'Onofrio, *supra* note 6, at 178, n.48.

[167] 1978 Report, *supra* note 133, at 30.

[168] Testimony of Jason S. Berman, *supra* note 129.

[169] D'Onofrio, *supra* note 10, at 175.

[170] Dixie Chicks, *Travelin' Soldier*, *on* Home (Open Wide Records 2002).

[171] Billboard, The Billboard Hot 100, Mar. 15, 2003, *available at* http://www.billboard.com/billboard/charts/hot100.jsp (last visited Mar. 7, 2003).

[172] *See* SINATRA, *supra* note 2 and accompanying text.
[173] O'Dowd, *supra* note 6, at 266. Some performers' styles are particularly susceptible to the argument that their contribution is of equal or greater value to that of the composer. For example, jazz performers will typically take a standard song, such as *Someday My Prince Will Come*, (a children's song composed by Frank Churchill and Larry Morley for the Disney classic, *Snow White*) and improvise to create a song pleasing to their audience. It is hard to imagine that many jazz fans would seek-out the Disneyana version of the song, although they readily enjoy the version recorded by Miles Davis. MILES DAVIS, *Someday My Prince Will Come, on* SOMEDAY MY PRINCE WILL COME (CBS 1961).

[174] 1978 Report, *supra* note 133, at 46 (citing *Copyright Law Revision, Hearings Before the Subcomm. on Patents, Trademarks, and Copyrights of the Senate Judiciary Comm.*, 90th Cong. (1967) (testimony of Stan Kenton, National Committee for the Recording Arts).

[175] 1978 Report, *supra* note 133, at 170 (citing Copyright Office Docket S 77-6, Comment Letter No. 12, at 19).

[176] D'Onofrio, *supra* note 10, at 176.

[177] *Id.*

[178] *See* 139 CONG. REC. E1724-01 (July 1, 1993); Fisher, *supra* note 52, at 14.

[179] 1978 Report, *supra* note 33, at 32 (citing *Hearing Before the House Comm. on Patents on Revision of Copyright Law*, 74th Cong. (1936)). Also, in his 1982 article on the need for a performance right, Steven D'Onofrio cited another portion of the Register's 1978 report, which in turn cited the testimony of Victor W. Fuentalba, President of the American Federation of Musicians: "Stations had a staff orchestra and a small staff of singers who provided the music that was broadcast. They worked on a great variety of programs ranging from classical to popular." *See* D'Onofrio, *supra* note 10, at 178, n.50.

[180] 1978 Report, *supra* note 133, at 168.

[181] Note that circumstances changed even more dramatically in the 1950s, as the use of music in television, films, and radio increased. For example, the FCC in 1948 predicted that there would soon be 3,100 AM stations in operation and 1,100 FM counterparts. *See* RUSSELL SANJEK & DAVID SANJEK, AMERICAN POPULAR MUSIC BUSINESS IN THE 20TH CENTURY 106, 119 (1991).

[182] U.S. CONST. art. I, § 8, cl. 8. This clause is commonly referred to as the "Copyright Clause."

[183] *See, e.g.*, Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) ("The immediate effect of our copyright law is to secure a fair return for an author's creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the public good."); Mazer v. Stein, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights in the conviction that encouragement of individual effort by personal gain is the best way to advance the public welfare through the talents of authors and investors in science and the useful arts.")

[184] H.R. REP. NO. 105-452, at 4 (1998).

[185] *See, e.g.*, Michael Keyes, *Whatever Happened to Works Deferred? Reflections on the Ill-Given Deferments of the Copyright Term Extension Act*, 26 SEATTLE U. L. REV. 97, 123 (2002) ("Congress set sail for the land of copyright term extensions without thoroughly analyzing and assessing whether such extensions were necessary for authors or ultimately beneficial for the social welfare.").

[186] *See, e.g.*, O'Dowd, *supra* note 6, at 259-60 ("[T]he probable end result of denying a public performance right in sound recordings is that investment in the production of music would drop precipitously.").

[187] As Prof. William Fisher explains in a forthcoming publication, "most of our great musicians – from Mozart to Coltrane to Clapton – seem to have been motivated more by love of the art, devotion to the music culture, or hunger for recognition than by dreams of great wealth." *See* Fisher, *supra* note 52, at 55.

[188] *See, e.g.*, RICHARD POSNER, ECONOMIC ANALYSIS OF THE LAW 51-52 (1977). The theory that there is a diminishing marginal return to money is widely accepted. Basically, the theory holds that "those with very high incomes attach very little value to tens of thousands, or even millions, of dollars." Martin J. McMahon & Alice G. Abreu, *Winner-Take-All Markets: Easing the Case for Progressive Taxation*, 4 FLA. TAX REV. 1, 35 (1998). As Mark Seidenfeld explains, "[f]or a poor person, another dollar may be the difference between going hungry and eating, while for a wealthy person, another dollar may make little real difference [in] her life." MARK SEIDENFELD, MICROECONOMIC PREDICATES TO LAW AND ECONOMICS 35 (1996). *But see* F. M. SCHERER, THE INNOVATION LOTTERY, *in* EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY: INNOVATION POLICY FOR THE KNOWLEDGE SOCIETY 3, 20-21 (2001), for the contrary argument in this particular context.

[189] There is much evidence that most artists find themselves in a precarious economic position. It is estimated that only twenty percent of albums are commercially successful. There is little return to the recording artist for even those albums that achieve "gold" status, or the sale of 500,000 units. *See* Kettle, *supra* note 6, at 1051, nn.43-44.

[190] There is a particularly great potential for a new performance right to incentivize production for those formats of music which typically struggle to obtain commercial success. Within this category one could include bluegrass, world music, blues, modern classical, and spiritual, to name a few. As one commentator explains, public performance royalties "could provide an additional source of revenues to offset often unimpressive sales returns, and would promote incentives for increased production of such types of music." *See* O'Dowd, *supra* note 6, at 267.

[191] *See* Fisher, *supra* note 52, at 51 (citing Steven Rosen, *The Economics of Superstars*, 71 AM. ECON. REV. 845-58 (1981)).

[192] *Id.* at 52.

[193] *See supra* notes 69-70 and accompanying text.

[194] *See supra* Part II.A.2.

[195] 1978 Report, *supra* note 133, at 163 (citing *Hearings on S.111 Before the Subcomm. on Patents, Trademarks and Copyrights of the Senate Judiciary Comm.*, 94th Cong., 237 (1975)).

[196] The term "payola" is a contraction of the terms "payoff" and "Victrola." Payola originated during the 1930s, when DJs first received compensation for broadcasting records played on the Victrola, an early (and very popular) record player. *See, e.g.*, Kathryn Bice, *Alston Awaits ABA's Final Report Before Making Waves*, AUSTRALIAN FIN. REV., Feb. 12, 2000, at 4; Park Moo-Jong, *Korean Version of Payola Scandal*, KOREA TIMES, Feb. 1, 1995, at 5.

[197] *See* Brooks Boliek, *Radio giant faults labels: Clear Channel CEO deflects pay-for-play blame*, HOLLYWOOD REP., Jan. 31, 2003, at 1. Payola became a "household word" in 1960 when popular DJ Alan Freed "went down for taking bribes to play records on [ABC affiliate] WINS." Frederic Dannen, *Hit Men/ Pink Floyd hits 'The Wall'/ Experiment keeps group's record off the airwaves*, HOUS. CHRON., Aug. 15, 1990, at 4.

[198] Anna Wilde Mathews, *Music Labels Say It Costs Too Much to Get Songs on Radio*, WALL ST. J., June 10, 2002, at B1.

[199] Pub. L. No. 86-752, § 8(b), 74 Stat. 896 (1960) (codified at 47 U.S.C. § 508).

[200] Bill Reynolds, *Why your local radio station sounds like this*, GLOBE & MAIL, Aug. 3, 2002, at R1.

[201] *Marketplace: Some radio stations to end the practice of accepting feeds from record promoters for payments* (Minnesota Public Radio broadcast, Oct. 22, 2002).

[202] Boliek, *supra* note 197.

[203] Reynolds, *supra* note 200.

[204] Mathews, *supra* note 198.

[205] *20/20: Profile: Radio Stations only play music on air after being paid by independent promoters* (ABC News broadcast, May 24, 2002). The term "platinum plaque" refers to a record that has sold over 1 million copies. *See, e.g.*, Paul Sexton, *Depeche Mode, Others, Attain Platinum Status*, BILLBOARD, Aug. 18, 2001, at 41.

[206] *Id.*

[207] Lauren J. Katunich, *Time to Quit Paying the Payola Piper: Why Music Industry Abuse Demands a Complete System Overhaul*, 22 LOY. L.A. ENT. L. REV. 643, 644 (2002).

[208] J. Gregory Sidak and David E. Kronemyer, *The New "Payola" and the American Record Industry: Transactions Costs and Precautionary Ignorance in Contracts for Illicit Services*, 21 HARV. J.L. & PUB. POL'Y 521 (1987) (citing Ronald Coase, *Payola in Radio and Television Broadcasting*, 22 J.L. & ECON. 269 (1979)).

[209] Mathews, *supra* note 198.

[210] Frank Saxe, *Noted*, BILLBOARD, Feb. 10, 2001, at 75.

[211] 1978 Report, *supra* note 133, at 168.

[212] *See supra* Part I.A.2.

[213] *See supra* note 28 and accompanying text.

[214] *See* Fisher, *supra* note 52, at 24.

[215] BIG BOPPER, *Chantilly Lace, on* CHANTILLY LACE (Mercury 1958).

[216] GLENN GOULD, A STATE OF WONDER: THE COMPLETE GOLDBERG VARIATIONS (Sony Classical 2002).

[217] *See, e.g.*, 1978 Report, *supra* note 133, at 164; O'Dowd, *supra* note 6, at 267.

[218] Peter L. Felcher, *Commentary: Performance Right Compromise*, BILLBOARD, Aug. 12, 1995, at P6.

[219] *Id.*

[220] As to the length of the grace period, there is a very real possibility that DJs would be pressured by broadcasters to avoid playing older songs. This concern may suggest that the safe harbor should be relatively short in duration, perhaps in the one-year range, so that the body of royalty-free songs from which to choose is not too voluminous.

[221] Saxe, *supra* note 35, at 1. *See also* 1978 Report, *supra* note 133, at 48 ("NBC argued that performance royalties would present an unwarranted financial burden on much of the broadcasting industry..."). In fact, many large radio conglomerates, such as Clear Channel Communications, have decided not to retransmit their signals over the Internet, claiming an inability to tolerate even the digital performance royalty payments which they would be obligated to pay to artists and record companies under the DPRA and DMCA. *See* Adrian McCoy, *Commercial Stations Face Hurdles*, PITT. POST-GAZETTE, May 27, 2001, at G3.

[222] 1978 Report, *supra* note 133, at 161. In her report, the Register found that broadcasters could in fact afford the additional cost of new performance royalties. The RIAA successfully persuaded her with the argument that "since a performance royalty for sound recordings would affect all radio stations of similar size equally, it will not substantially affect interstation competition." The 1978 Report concluded that only those stations truly operating at the margin would be significantly affected by the adoption of a general performance right. *Id.*

[223] Jenny Toomey, *Empire of the air*, THE NATION, Jan. 13, 2003, at 28.

[224] *Id.*

[225] *Id.*

[226] Telecommunications Act of 1996, Pub. L. No. 104-104, § 202, 110 Stat. 56 (1996).

[227] Toomey, *supra* note 223, at 28.

[228] *Id.*

[229] Press Release, Radio Advertising Bureau (RAB), Radio's Time Has Come Says Fries, Addressing a Crowd of Over 1600 Radio Professionals at the RAB2003 Conference, *available at* http://www.rab.com/pr/pr_detail.cfm?id=143 (last visited Sept. 13, 2003). Overall radio advertising revenue figures for 2003 had not been released at time of this article's publication.

[230] *Id.*

[231] *Id.* As the President and CEO of the Radio Advertising Bureau has explained, "[t]he people in this business have learned how to grow during tough times and that's going to make it a lot easier to take advantage of forward momentum as the times continue to improve." *Id.*

[232] *Id.*

[233] *See Ahead of the Tape*, WALL ST. J., Jan. 23, 2004 ("Tack on corporate profits (up 25% in the third quarter of 2003), the low cost of raising money and strong profit margins, and the picture of corporate health looks rosy indeed.").

[234] Note a similar prediction made by an Internet industry analyst, Mark Mooradian of Jupiter Communications, called the imposition of the digital performance royalty "a change in existing business models for companies specializing in Internet radio, rather than a dramatic impact for good or bad." *See* Taylor, *supra* note 110, at 1.

[235] *See* Copyright Arbitration Royalty Panel, Library of Congress, In the Matter of Digital Performance Right in Sound Recordings and Ephemeral Recordings, CARP DTRA 1&2, Docket No. 2000-9, at 19-38 (2000) (rebuttal testimony of William W. Fisher III) [hereinafter Fisher rebuttal testimony]. Prof. Fisher concludes that in nine jurisdictions, economic data suggests that licenses to broadcast sound recordings are no more valuable than licenses to broadcast musical work. The jurisdictions are Australia, Canada, France, Germany, the Netherlands, Norway, Spain, Sweden, and the United Kingdom. *Id.*

[236] *See supra*, note 221 and accompanying text.

[237] Bill Holland, *Music business urges Congress to adapt performance right*, BILLBOARD, Apr. 3, 1993, at 6 ("For the first time in 12 years, the U.S. record industry officially asked Congress March 25 to create a performance right in sound recordings, saying near-future digital delivery systems could severely hurt the industry unless there are [new] copyright safeguards.")

[238] Brett Atwood, *Net Music Broadcasts May Need Another License*, BILLBOARD, May 17, 1997, at 8.

[239] Report of the CARP, *supra* note 93, at 27. Note also that the Digital Music Association (DiMA), the webcasting trade group, suggested a fee of 0.015 cents per song per listener. While the rate reached by the Librarian of Congress is 4.667 times greater than that proposed by DiMA, the .4 cent rate asked for by the RIAA would have been 26.667 times greater than the webcaster number. *See* Bates, *supra* note 119, at B8.

[240] *Id.* ("Many webcast businesses are concerned that a new fee might cripple the webcast industry while it is still in its infancy. There is particular concern about the RIAA's suggestion that record companies and recording artists should be responsible for establishing the fee, which is likely to be higher than a compulsory licensing fee, according to a number of sources.")

[241] Clark, *supra* note 29.

[242] *See supra* Parts I.A.1 & I.A.2. In fact, as members of a highly concentrated industry, recording companies would be far more apt than are music publishers in securing oligopolistic rates in the absence of a compulsory license. The top five U.S. record companies control over 85% of the market for phonograms. *See* Brandon Mitchener and Philip Shishkin, *Time Warner, EMI Face the Music in Brussels*, WALL ST. J., Sept. 6, 2000, at A18. Recall also that music publishers are constrained by the PRO consent decrees, while there is no guarantee that recording companies would be similarly inhibited.

[243] Bill Holland, *House Oks Webcast Royalty Bill; Foes Take Case to Senate*, BILLBOARD, Oct. 19, 2002, at 1 ("Small Webcasters had complained to Congress that the rate set by the Librarian of Congress... was exorbitant and would drive them out of business. The rate amounted to 70 cents per song per 1,000 listeners. In many cases, it would have been hundreds of times higher than the songwriter royalty rates already paid by both traditional broadcasters and Webcasters.")

[244] William Glanz, *U.S. Webcasters Hit Hard by Royalties Decision; More than 30% of Stations Have Quit Airing Music*, WASH. TIMES, Sept. 21, 2002, at C10 ("'It is directly related to the royalty dispute,' said George Bundy, chairman and chief executive of BRS Media Inc., a San Francisco firm that compiled the [report regarding a shutdown of 1,770 webcasters in a one year period].")

[245] *See, e.g.*, Ashley Norris, *Internet Radio Stations May Have to Shut Up Shop*, GUARDIAN (London), Oct. 17, 2002, at P7. Although most European countries have or are contemplating a digital performance right, the rates there are lower than in the U.S. *See* Fisher rebuttal testimony, *supra* note 235, at 19-38.

[246] *European Webcasters Poised to Dominate Web Radio*, EUROPEMEDIA, Sept. 12, 2002, *available at* 2002 WL 10691243.

[247] SoundExchange Letter, *supra* note 103.

[248] Indeed, the Small Webcaster Settlement Act of 2002 states, "Congress has strongly encouraged... copyright owners... [and] the small webcasters to... arrive at an agreement that would include a fee based on a percentage of revenue." *See*

Small Webcaster Settlement Act of 2002, Pub. L. No. 107-321, § 2, 116 Stat. 2780 (2002).

[249] *See* 17 U.S.C. § 114(f)(2)(B) (Supp. I 2003). The "willing buyer, willing seller" metric did not necessarily require the CARP to adopt a per performance royalty structure, as demonstrated by recent Congressional action in enacting the Small Webcaster Settlement Act of 2002. *See infra* note 107 and accompanying text.

[250] *See, e.g.*, Alfred C. Yen, *The Legacy of Feist: Consequences of the Weak Connection Between Copyright and the Economics of Public Goods*, 52 OHIO ST. L.J. 1343, 1366 (1991). ("[P]ublic goods exhibit nonrivalrous consumption and nonexcludability. To take a common example of a public good, consider a lighthouse. While only one person may consume an apple, any number of sailors can use a lighthouse to be warned of imminent danger. While the seller of an apple can prevent nonpurchasers from enjoying it, the lighthouse owner has no method of extracting payment from all who benefit from the beacon.")

[251] *See* MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT LAW § 1.8[B] (3d ed. 1999); Frank H. Easterbrook, *The Supreme Court and the Economic System*, 98 HARV. L. REV. 4 (1984). Judge Easterbrook's article provides a comprehensive analysis of the tradeoffs between the *ex post* and *ex ante* visions of intellectual property.

[252] *See infra* note 182 and accompanying text. *See also* Wendy J. Gordon, *Authors, Publishers, and Public Goods: Trading Gold for Dross*, 36 LOY. L.A. L. REV. 159, 161 (2002) ("The Constitution's Copyright and Patent Clause is explicit both in recognizing that copyrights and patents must serve the public benefit, and in articulating a primary tool needed to serve that goal: limits on duration.").

[253] Easterbrook, *supra* note 251, at 27.

[254] For the year 2002, the RIAA reported 33,443 new album releases. *See* Jane Black, *Big Music's Broken Record*, BUS. WK. ONLINE, Feb. 13, 2003, *available at* 2003 WL 6951839.

[255] *See* discussion *supra* Part II.A.1. In his recent article calling for a full public performance right, Prof. Kettle writes that "[i]n light of the very lucrative entertainment export [of the U.S.], it remains questionable as to why Congress has not exercised its powers to maximize the economic benefits of the music export." Kettle, *supra* note 6, at 1074. Kettle implies that a wave of new revenues would result from the adoption of a full performance right, ignoring the destabilizing effects of U.S. accession to the Rome Convention. Recall his assertion that "[s]ince the United States does not provide a full public performance right for sound recordings, American recording artists and record labels are not entitled to receive the millions of dollars in foreign royalties collected that would otherwise be payable." *Id.* at 1075.

[256] *See, e.g.*, Fisher rebuttal testimony, *supra* note 235, at 38 (supporting the position of webcasters that "licenses to broadcast sound recordings are no more valuable than licenses to broadcast musical works").

[257] Clark, *supra* note 29 (quoting a figure of $15 million as the amount at stake in the digital performance royalty debate for the period 1998 to 2002).